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THE CORONATION CASES—I

THE Coronation Cases are a landmark in the history of impossibility of performance of contract, and are still the most disputed group of cases in this difficult topic. Two cases stand out from the rest. One is *Krell v. Henry*,¹ which has been vigorously defended² and as vigorously criticised.³ The object of this article is, first of all, to examine it anew and to contend for a more restricted interpretation of it than that usually adopted. Then, in the light of this interpretation, we shall consider the present position of the lessee's contract to pay rent where the premises are destroyed during the term. The other important Coronation Case is *Chandler v. Webster*,⁴ which now has few apologists. The authority and scope of this decision will be considered in the next succeeding article.

I. *KRELL v. HENRY* AND THE DOCTRINE OF FAILURE OF CONSIDERATION

To begin the story leading up to *Krell v. Henry* we must go back for a moment to the well-known Surrey music-hall case (*Taylor v. Caldwell*, 1863).⁵ The first point to remark about this is that it was a true case of impossibility of performance. The

¹ [1903] 2 K.B. 740.

² P. A. Landon in (1936), 52 L.Q.R. 168, an endeavour to dispel the doubt cast upon the case by Lord Wright in *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A.C. 524 at 528.

³ D. M. Gordon in (1936), 52 L.Q.R. 324.

⁴ [1904] 1 K.B. 493.

⁵ 3 B. & S. 826. The principle of this case is studied in McElroy, *Impossibility of Performance*, to be published shortly by the Cambridge University Press.

action was brought by the hirer (or licensee) of the music-hall against the owner, and the owner was held to be excused from his contractual obligation to provide the hall on the ground that it was a "specified thing" that had "perished." Had the action been brought the other way round, by the owner against hirer for unpaid hire, the case would not strictly have been one of impossibility, for there would have been no impossibility in the payment of the hire. It should then have been regarded as one of failure of consideration, the hirer being excused from his undertaking to pay hire on the ground that the expected return for it had substantially failed.⁶

The actual decision in *Taylor v. Caldwell* was that impossibility of performance was excusable in law if the contract concerned a "given person or thing" and if that person or thing "perished." These were the limits of the decision, and they were steadfastly adhered to throughout the nineteenth century. An instructive pair of cases to illustrate them is *Nickoll v. Ashton* (1901), and *Ashmore v. Cox* (1899).⁷ In *Nickoll v. Ashton*⁸ a particular ship, named to carry a cargo of cotton seed, had, owing to stranding, ceased to exist as a cargo-carrying ship at the material time fixed for performance. It was held that the contract was discharged. But in *Ashmore v. Cox*⁹ the Court refused to apply the principle of *Taylor v. Caldwell* to a contract very similar to that in *Nickoll v. Ashton*, save only that it provided for the shipment of goods "by sailer or sailers," instead of a named ship. Here there was no "given thing" within the rule.

But the effect of *Taylor v. Caldwell* upon legal theory does not end here. The particular way in which the rule was expressed was by a fiction of implied condition. The Court adopted this fiction out of respect for *Paradine v. Jane*;¹⁰ it wished to introduce an exception to the rule in *Paradine v. Jane* without impairing the authority of the rule. Unfortunately, however, the fictitious character of the implication was not made clear in *Taylor v. Caldwell*, and the result is that other Courts have treated the principle of that case as being wider than it really was. It has

⁶ The judgment, at p. 840, says that "both parties are excused," without distinguishing between the separate legal doctrines applicable to each, viz., excusable impossibility on the one side, and failure of consideration resulting from excusable impossibility on the other. See further, on this distinction, Williams in McElroy, *op. cit.*, pp. 99-100.

⁷ Other cases decided on or partly on the rule during the remainder of the century were *Boast v. Firth* (1868), L.R. 4 C.P. 1; *Baily v. De Crespigny* (1869), below; *Robinson v. Davison* (1871), L.R. 6 Ex. 269; *Howell v. Coupland* (1876), 1 Q.B.D. 258. See also *Appleby v. Myers* (1867), L.R. 2 C.P. 651, which will be discussed in the next article.

⁸ [1901] 2 K.B. 126.

⁹ [1899] 1 Q.B. 436, followed in *Sargant v. Paterson* (1923), 39 T.L.R. 378.

¹⁰ (1647), Aleyn 26.

been assumed that a term may be implied dissolving a contract whenever "in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition."¹¹ Read as widely as this, the decision in *Taylor v. Caldwell* constitutes a grave threat to the general principle of sanctity of contract.

The germ of this extensive interpretation can be seen in *Baily v. De Crespigny* (1869).¹² Here the cause of impossibility was a subsequent change of law. Defendant, who was the owner of a paddock adjoining premises that he had demised to the plaintiff, covenanted with the plaintiff that neither he nor his assigns would permit any building on the paddock. A railway company empowered by Statute subsequently acquired the paddock by compulsory purchase and erected buildings on it.

The only question in this case was whether it could be distinguished from the early case of *Brewster v. Kitchell* (1698),¹³ in which it had been laid down, over a century and a half earlier than *Taylor v. Caldwell*, that "if a man covenants to do a thing which is lawful and an Act of Parliament comes in and hinders him from doing it the covenant is repealed." In *Baily v. De Crespigny* plaintiff contended that defendant, by this authority, was not relieved from liability on his covenant in respect of acts which the railway was merely *empowered* to do, but was relieved only as to those acts which the company was *required* by the Act of Parliament to do. To this argument the Court replied:

"We do not think that this distinction is well founded. . . .

The covenantor in this case is equally disabled from preventing the railway company from doing those things which it is *empowered* to do, as those which it is *required* to do; why then should there be a difference in the liability of the covenantor with respect to the one and the other?"¹⁴

Upon this finding the judgment might have rested. The case was not exactly one of supervening illegality, but it fell comfortably within a principle that applies to all cases of requisition or compulsory purchase, namely, that where a contract concerns a specific thing and the thing is requisitioned or compulsorily acquired by a third party, neither the requisition itself nor any consequential failure to perform the contract is reckoned as a breach of contract—in other words, the obligation to perform the contract is discharged.¹⁵ The rule is akin to that in *Taylor v.*

¹¹ These words were used by Lord Blackburn, 3 B. & S. at 834.

¹² L.R. 4 Q.B. 180.

¹³ 1 Salk. 198; 1 Ld. Raym. 317.

¹⁴ L.R. 4 Q.B. at 187 (italics are in the original).

¹⁵ Cp. *Re Shipton, Anderson & Co. and Harrison Bros.*, [1915] 3 K.B. 676.

Caldwell; in fact, the requisitioning of the thing may be regarded as a constructive perishing within the principle of that decision.

This being so, it is perhaps not surprising that the Court should have turned to the doctrine of implied condition as a way of explaining its decision. What is important to notice is the way in which the doctrine is expressed. Lord Hannen (then Mr. Justice Hannen), delivering the judgment of the Court, put it in these words.

"... where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."¹⁶

For the purpose of this rule the facts were found upon as follows—

"The Legislature, by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties."¹⁷

It will be seen that this gives a definitely subjective turn to the doctrine of implied condition. The Court, in invoking the theory of an implied term, adopted for it a subjective test which purported to determine the question of implication by reference to what was in the contemplation (or, rather, what was not in the contemplation) of the parties at the time of entering into the contract. This way of putting the matter is misleading. While it has done little harm in cases where the specific subject-matter of a contract perishes or is requisitioned (for here the true principle is usually clear), it has been the cause of considerable

¹⁶ At p. 185.

¹⁷ At pp. 186-7. Cp. the dissenting opinion of Vaughan Williams, L.J., in the later case of *Nickoll v. Ashton*, [1901] 2 K.B. 126 at 136. Applying the subjective test laid down in *Baily v. De Crespigny*, he found it impossible to find an implied condition dissolving the contract there in question. The fact that, two years later, in *Krell v. Henry*, the same learned Lord Justice was led, by an application of the same subjective form of reasoning, to reach the opposite conclusion in a case in which there was again no provision in the contract touching the event which happened, indicates the inconclusive and unsatisfactory nature of the test for implication which the Court, in *Baily v. De Crespigny*, purported to lay down.

misunderstanding in other cases of supervening impossibility, particularly in the Coronation Cases.

The circumstances which gave rise to the Coronation Cases were very special. The Coronation of King Edward VII was to be marked by certain celebrations, chief among which were the coronation procession itself and a naval review at Spithead. In anticipation of these events many contracts had been made for the hire of vessels to see the naval review. Two days before the dates fixed for the procession and review they were cancelled owing to the illness of the King. The fleet, however, had assembled, and many people took a day's cruise round the assembly of naval vessels.

Arising out of the cancellation of the procession and the review a series of about ten cases came before the Courts. These cases fall into four groups as follows—

I. Those in which a defendant sought to be excused from paying a sum of money on the ground that plaintiff's performance, which was the whole consideration of his promise to pay, had become impossible.¹⁸

II. Those in which the paying party (now become the plaintiff) sought to recover moneys already paid on the same ground as that set out in I, and for this purpose brought an action for moneys had and received.¹⁹

III. Those in which a suit was brought for moneys had and received, but the contract was made after the date of cancellation and in ignorance of that fact.²⁰

IV. Those in which the parties had made express provision for their rights and liabilities in the event of cancellation.²¹

From the foregoing classification it will be seen that there was no case in which a defendant sought to be excused upon the ground that performance of his own promise had become impossible. It is plain therefore that there was no case to which the principle of *Taylor v. Caldwell* was properly applicable.

Groups III and IV created little difficulty. In Group IV the only question involved was one of interpretation, namely, the meaning to be given to what the parties had said. The cases in

¹⁸ *Krell v. Henry*, [1903] 2 K.B. 740; *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K.B. 683.

¹⁹ *Blakeley v. Muller & Co.*; *Hobson v. Pattenden & Co.*, [1903] 2 K.B. 760 n.; *Civil Service Co-Op. Socy. v. Gen. Steam Navig. Co.*, [1903] 2 K.B. 756; *Chandler v. Webster*, [1904] 1 K.B. 493; *Lumsden v. Barton & Co.* (1902), 19 T.L.R. 53.

²⁰ *Clark v. Lindsay* (1903), 19 T.L.R. 202; *Griffith v. Brymer* (1903), 19 T.L.R. 434.

²¹ *Elliott v. Crutchley*, [1906] A.C. 7; *Fenton v. Victoria Seats Agency* (1902), 19 T.L.R. 16.

Group III were cases of failure of consideration arising out of the circumstances of mutual mistake.

The difficulty was caused by Groups I and II. These cases were unfortunately treated as though the question of an implied condition were involved, this implied condition being the fiction which was first introduced in *Taylor v. Caldwell*. The fictitious nature of the implication was not perceived, perhaps because of the manner in which it had been dealt with in *Baily v. De Crespigny*.

One of the earliest Coronation Cases to be decided, and what may be termed the "key" case of them all, was *Krell v. Henry*.²² The facts of this case were as follows. Rooms situated on the route of the procession had been hired for the two days on which it was to take place, for the sum of £75. The written agreement recording this transaction consisted of two letters which passed between the defendant and the plaintiff's solicitors, which letters, however, contained no express reference to the coronation processions, or to any purpose for which the flat was taken. Defendant, by his letter, simply acknowledged the agreement to take the suite and sent £25 as a deposit, promising to pay the balance on the 24th June—two days before the dates fixed for the procession. Early on the morning of the 24th it was announced that the coronation and processions would not take place, and the defendant refused to pay the balance of the hire of the flat.

On action being brought, the defendant denied his liability on the ground that, the procession not having taken place owing to the serious illness of the King, there had been a total failure of consideration for the contract entered into by him. The Court of Appeal (Vaughan Williams, Romer and Stirling, L.J.J.) held, on a purported application of the principle of *Taylor v. Caldwell*, that the defendant was right in refusing to pay the balance of the hire.

Sir John Salmond, commenting on *Krell v. Henry*, observed that "while there can be no doubt as to the soundness of the conclusion in this case, the reasoning of the Court is open to the observation that the case was dealt with as if it was one of impossibility of performance, as in *Taylor v. Caldwell*, which it clearly was not."²³

While agreeing with Salmond's statement of what this case is not, we do not agree, with great respect, with a previous statement of the learned author of what the case is. He classifies it as a case in which there is "supervening impossibility of the fulfilment

²² [1903] 2 K.B. 740.

²³ Salmond and Winfield, *Law of Contracts*, p. 306.

of the purposes with which the contract was made," and he distinguishes it from a case like *Taylor v. Caldwell* in which there is "supervening impossibility of performance."²⁴ But *Krell v. Henry* was an action against the hirer of the rooms for the payment of money, and there was no impossibility, in the legal sense, in the payment of money. The defendant was held to be excused because there was a total failure of the consideration for his promise to pay.

It is thought that this may be clearly shown by comparing this case with the case of *Knowles v. Bovill*²⁵ decided by the Court of Exchequer about thirty years earlier. The facts of this latter case were these. Plaintiff had paid £150 for the use of a patent which the patentee was about to renew and for the use of a new patent which the patentee was about to take out. The patentee died almost immediately after receiving payment and before he had made the applications. Plaintiff brought an action against the executors claiming recovery of the £150 on the ground that the consideration had totally failed. The principal question at issue was whether, on the true construction of the written contract between the parties, plaintiff had bought the right to have an application for the patents made, or merely the right to have the benefit of it if it should happen to be made. The Court held that what the plaintiff bought was an application and that as this was not made there was a total failure of consideration and he was entitled to recover.

In discussing the main question Baron Martin made the following observations—

"The true test in this case is the question, what did he buy? In my opinion he bought an application for the grant of one patent, and the prolongation of the other. By the contract he was to take the chance of the failure or success of such application. But what he bought was an application. The result is that the consideration in this case wholly fails, because it is admitted such application never was and now never will be made. . . . If I thought . . . that plaintiff only bought the chance whether an application would be made and prove successful, the case might be different, but I do not think that is the true meaning of the contract."²⁶

This case was not cited in *Krell v. Henry*, but the similarity in the circumstances will be readily perceived. It is thought that if the test which Baron Martin there laid down, namely, "What

²⁴ At p. 305.

²⁵ (1870), 22 L.T. 70.

²⁶ At p. 71

did he buy?" be applied to the case of *Krell v. Henry*, it throws much light on the true ground of the decision in the latter case. The answer in that case is that he bought "rooms to view the procession." All the circumstances of the case point to this conclusion. One matter in particular which points to it is the authority under which parol evidence was admitted.

It has been mentioned that the written agreement was contained in two letters which contained no reference whatever to the procession. Extrinsic evidence was admitted by the Court, however, which showed that, on 17th June, 1902, the defendant noticed in the windows of the plaintiff's flat an announcement to the effect that windows to view the Coronation procession were to be let; that the defendant interviewed the housekeeper on the subject, when it was pointed out to him what a good view of the processions could be obtained from the premises, and that he eventually agreed with the housekeeper to take the suite for the two days (but not the nights) of the 26th and 27th June, for the sum of £75. It was this arrangement which was confirmed by the two letters which passed between the defendant and the plaintiff's solicitors.

This parol evidence was admitted on authorities which established the "broad and distinct rule of law that extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the *subject-matter* of the instrument, or, in other words, to identify the persons and things to which the instrument refers must of necessity be received,"²⁷ the authority which was most directly in point being the opinion of Lord Chief Justice Campbell that "when there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of shewing *what that subject-matter was*, of every fact within the knowledge of the parties before and at the time of the contract."²⁸

Had it not been possible to admit extrinsic evidence in *Krell v. Henry* within the authority of the above-mentioned proposition, such evidence could not have been admitted. It is respectfully submitted that it could certainly not have been admitted (as has sometimes since been supposed) for the purpose of establishing the following enlargement of the implied condition theory of *Taylor v. Caldwell*, namely, that a contract may be dissolved by virtue of an implied condition having reference to the "non-

²⁷ Taylor on *Evidence*, Vol. II, Sec. 1082 (edition not mentioned), citing (*inter alia*) *Mumford v. Gething* (1859), 7 C.B. (N.S.) 305, and *Macdonald v. Longbottom* (1859), 1 E. & E. 977. (The relevant section is now Section 1194 in the 12th ed.)

²⁸ *Macdonald v. Longbottom*, *cit. sup.*, at p. 983. The italics are ours.

existence of a state of things," in cases where that "state of things" was never mentioned in the contract at all.²⁹ This last proposition, it is respectfully submitted, would utterly destroy the parol evidence rule. Unfortunately, the attempt to explain the result of the decision in *Krell v. Henry* in terms of the implied condition theory of *Taylor v. Caldwell* necessarily compelled the Court to use language which suggested that extrinsic evidence could be used for this purpose. The passage which suggests this will later be mentioned.³⁰ It is first proposed to show the true ground of the decision.

Lord Justice Vaughan Williams, who delivered the principal judgment in *Krell v. Henry*, after referring to the above authorities admitting extrinsic evidence, went on to say—

"I myself am clearly of opinion that in this case, where we have to ask ourselves whether the object of the contract was frustrated by the non-happening of the coronation and its procession on the days proclaimed, parol evidence is admissible to show that the *subject of the contract was rooms to view the coronation procession, and was so to the knowledge of both parties.*"³¹

This passage appears to afford clear indication that the Court took the view that the contract amounted in effect to the sale and purchase of a view of the coronation procession. Applying the test question of Baron Martin, "What did he buy?" the answer is that the defendant in *Krell v. Henry* bought a "view of the coronation procession." The plaintiff's failure to provide that view, though it arose from no default of his, and therefore did not amount to a breach, was a failure going to the whole of the consideration, and *this* excused the defendant from his promise to pay. Indeed, this view of the case is implicit, if not explicit, in the following further remark of Lord Justice Vaughan Williams—

"I think that the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract."³²

It is respectfully submitted that there was no reason why the judgment might not have rested simply on this finding.

But the Court, having unfortunately assumed that the case was one calling for an application of the principle of *Taylor v.*

²⁹ It is thought to be significant that *Krell v. Henry* is an authority which is entirely omitted from *Taylor on Evidence*. See 12th edition.

³⁰ See *post* p. 252, *et seq.*

³¹ [1903] 2 K.B. at p. 754.

³² At p. 751.

Caldwell, was committed to the attempt to explain the result in accordance with that principle. In doing so it was necessarily compelled to use language which, considered in the abstract, expressed the doctrine of implied condition in terms of perilous breadth.

This principle, the fictitious nature of which seems not to have been perceived, was expressed both subjectively and objectively. It is proposed to examine briefly each of these statements of it.

In applying the principle subjectively, the Court adopted the reasoning of *Baily v. De Crespigny*. Thus Lord Justice Vaughan Williams said—

“I think that the non-happening of the procession, to use the words of Sir James Hannen in *Baily v. De Crespigny*, was an event ‘of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened.’”³³

The indeterminate nature of this test is plainly shown by the doubt expressed by Lord Justice Romer in reaching the same conclusion in this case—³⁴

“With some doubt I have also come to the conclusion that this case is governed by the principle on which *Taylor v. Caldwell* was decided. . . . The doubt I have felt was whether the parties to the contract now before us could be said, under the circumstances, not to have had at all in their contemplation the risk that for some reason or other the coronation processions might not take place on the days fixed; . . . and whether, under this contract, that risk was not undertaken by the defendant. But on the question of fact as to what was in the contemplation of the parties at the time, I do not think it right to differ from the conclusion arrived at by Vaughan Williams, L.J., and (as I gather) also arrived at by my brother Stirling.”³⁵

As Lord Justice Romer shows, it might have been said with equal facility that the parties, since they anticipated the procession, must be taken to have anticipated its possible inter-

³³ At pp. 751-2.

³⁴ At p. 755.

³⁵ Stirling, L.J., merely expressed his entire agreement with the judgment of Vaughan Williams, L.J. (at p. 755).

ruption and ought to have been wise enough to guard against the failure of the contract in such a case. Indeed, with the greatest respect, we venture to suggest that the latter is the more reasonable inference. Whatever the correct inference may be, however, it is plain that the rule stated in this way affords no certain guide to the solution of these problems.

An equally serious objection to the rule is that it constitutes a grave threat to the principle of sanctity of contract. The mode of statement adopted by Sir James Hannen suggested that implication was justified by the mere fact that the event which happened was "not in the contemplation of the contracting parties when the contract was made." If this were so, it would reverse the historical English approach to the binding force of contract. Similar objection may be taken to the latter part of the passage which lays it down that "parties are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened." In so far as this purports to lay down a rule of construction with reference to "general words," it is submitted, with respect, that it is not in accordance with other authority. In at least two cases, both arising out of the circumstances of impossibility, it has been indicated that precisely the opposite is the true rule of construction upon this point.³⁶

The manner in which *Krell v. Henry* purported to extend the objective limits of *Taylor v. Caldwell* must now be considered. We have seen that when Lord Blackburn introduced this fiction he confined its application to cases in which performance depended on the continued existence of a "given person or thing"; and we have seen that, up to the beginning of the twentieth century, Courts resolutely refused to apply this principle more widely than to non-existence of a specific thing essential to performance—this last being the limit which had been reached with the case of *Nickoll v. Ashton* decided in 1901.³⁷

In *Krell v. Henry*, however, Lord Justice Vaughan Williams was obliged, in order to adapt the principle of *Taylor v. Caldwell* to the circumstances of the case then before the Court, to treat *Nickoll v. Ashton* as authority for a proposition which was not mentioned in that case as the ground of the decision, and which, in our respectful submission, completely obscures the vital distinction between that case and the earlier decision in *Ashmore v.*

³⁶ *Appleby v. Dods* (1807), 8 East 300, per Lord Ellenborough at 303; *French Marine v. Compagnie Napolitaine d'Eclairage*, [1921] 2 A.C. 494, per Lord Sumner at 519.

³⁷ [1901] 2 K.B. 126.

Cox.³⁸ How this was done may be seen in the following passage in which the learned Lord Justice states—

“Whatever may have been the limits of the Roman law, the case of *Nickoll v. Ashton* makes it plain that the English law applies the principle [of *Taylor v. Caldwell*] not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or *state of things*, going to the root of the contract, and essential to its performance.”³⁹

It will be noticed that, for the purpose of making this extension fit the circumstances of *Krell v. Henry*, the case of *Nickoll v. Ashton* has been treated as an authority for the application of the principle to an “express condition or state of things.” While this description may accurately fit the circumstances in *Nickoll v. Ashton*, it is respectfully submitted that it is not the ground on which that case was decided.

The learned Lord Justice then proceeds to lay down the “logical” extension of this rule in terms which would cover the circumstances of the case then before the Court.⁴⁰ Whereas, in the passage just quoted, the word “express” is used to qualify the words “condition or state of things,” in this succeeding passage (which is too long for reproduction here) it is announced that the “state of things” need not be “express” but can, if necessary, be established by extrinsic evidence. Thereafter, the fiction of *Taylor v. Caldwell* is without limit.

The profound influence which this case has had upon the subsequent development of legal theory may be seen by comparing with the above passage the following statement of the doctrine of implied condition, made by Lord Loreburn in *Tamplin v. Anglo-Mexican S.S. Co.*,⁴¹ one of the earliest of the War cases to come before the House of Lords. Lord Loreburn said—

“A Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to

³⁸ [1899] 1 Q.B. 436.

³⁹ [1903] 2 K.B., at pp. 747-8.

⁴⁰ At p. 749.

⁴¹ [1916] 2 A.C. 397, at p. 403.

that effect will be implied, though it be not expressed in the contract."

The passage is usually taken to be the authoritative expression of the principle in its wider form.⁴² It is respectfully submitted that it is dangerous to do so.⁴³ This passage suggests that, if a Court forms the opinion (though in the nature of things that opinion can never be but speculative) that both parties "contemplated" the continued existence of a "state of things," the Court is justified, by that fact alone, in reading into the contract a condition that if the "state of things" should cease to exist, the contract is dissolved, even though the contract itself contained no reference whatever to this "state of things." In other words, that the Court may, as the result of purely *ex post facto* construction, "make" a contract for the parties.

Attempts to invoke *Krell v. Henry* as widely as this were made in a number of War cases. It is significant that all attempts to invoke the principle of *Taylor v. Caldwell* in this way have been successfully resisted, but it is unfortunate that, in resisting these attempts, the Courts have not exposed the inherent unsoundness of the principle so stated. With all respect, one ventures to say that, so far, this successful resistance appears to have been due rather to the instinct of judges that such a principle would inevitably undermine the sanctity of contract, than to any clear understanding of the reason for its unsoundness. In the very cases in which they have declined to apply it, Courts have approved the principle so stated.⁴⁴ Yet there is no case so far decided in which a contract has been dissolved in circumstances such as those described, simply and solely by an application of the doctrine of implied condition as laid down in *Krell v. Henry*.

Before passing from this case, another difference between the two grounds of decision may be noticed. If the decision be rested upon the ground of implied condition, the contract seems to be discharged at the option of *either* party. If, on the other hand, it be put simply upon the ground of failure of consideration, the contract is discharged only at the option of the hirer. In this respect, too, the latter ground seems to be preferable. If the hirer is still willing to pay the full rent of the rooms, there is no reason why he should not have them.⁴⁵

⁴² See Salmond and Winfield, *Law of Contracts*, p. 297; Chitty on *Contracts*, 19th ed. at pp. 145, 147.

⁴³ Cp. Smith's *L.C.*, 13th ed., pp. 632, 633.

⁴⁴ See, e.g., *Tamplin v. Anglo-Mexican S.S. Co.*, [1916] 2 A.C. 397; *Blackburn Bobbin Co. v. Allen & Sons*, [1918] 2 K.B. 467; *Larrinaga & Co. Ltd. v. Société Franco-Américaine, etc.* (1923), 29 Com. Cas. 1.

⁴⁵ We differ, with respect, from the view of Pollock: (1904), 20 L.Q.R. 3. For other consequences of the view that *Krell v. Henry* should be rested on the doctrine of failure of consideration see Williams in McElroy, *op. cit.*, Chapter V.

The only other Coronation Case which falls within Group I of the classification made above is *Herne Bay Steam Boat Co. v. Hutton*.⁴⁶ This case was decided a few days before *Krell v. Henry*, by the same Court of Appeal. The facts were these. Defendant made a contract to hire a ship "for the purpose of viewing the naval review and for a day's cruise round the fleet." After the making of the contract the naval review was cancelled. The defendant thereupon refused to have anything to do with the contract or to pay for the hire of the ship. He was sued for the hire of the ship. In this instance the Court held he was liable, again on a purported application of the principle of *Taylor v. Caldwell*.

In this case the ground for refusing to imply a condition dissolving the contract was said to be that there was no particular fitness in the ship for seeing the review. Any other ship would have done as well. The reference to the naval review was inserted, it was said, in order to define more exactly the nature of the voyage and was not such as to constitute the naval review the "foundation of the contract." The defendants, it was said, had performed their part of the bargain by offering the use of the ship, and the purpose for which the defendant required it was not their concern.

It is difficult to appreciate the soundness of this distinction. It may be replied that the number of ships suitable for seeing the review which could have been in that neighbourhood at the time was not unlimited. Moreover, the same argument could be applied equally well to *Krell v. Henry*. It could be said with equal truth that there was no particular fitness in the room which was let in that case. Any other room on the route of the procession would have done as well, and there must have been quite as many rooms overlooking the route of the procession as there were ships in the vicinity of Spithead capable of being hired for this particular purpose of viewing the fleet.

On the grounds of the particular distinction taken, or purported to be taken, this case has ever been difficult to reconcile with *Krell v. Henry*.

Another possible distinction may be suggested, namely that in *Herne Bay Co. v. Hutton* there was not a total, or even a substantial, failure of consideration. A substantial part of the defendant's purpose could still have been realised. The ship was hired "for the purpose of viewing the naval review and for a day's cruise round the fleet." As the fleet was still there passengers might have been found, as the Court pointed out, who

⁴⁶ [1903] 2 K.B. 683.

were willing to go round it. Indeed subsequent events proved that such people were found in large numbers. It may be thought therefore that in *Herne Bay Co. v. Hutton* there was merely a partial failure of consideration, which, in our law, is not a sufficient ground for dissolution of the contract. Indeed, towards the end of his judgment in the case Lord Justice Romer expressly makes this a ground of his decision—

“It cannot be said,” observed the learned Lord Justice, “that by reason of the failure to hold the naval review there was a total failure of consideration.”⁴⁷

Summarising the foregoing observations it is submitted that while the decision in *Krell v. Henry* is undoubtedly correct, and while the decision in *Herne Bay Steam Boat Co. v. Hutton* is possibly correct also, these decisions were reached by purporting to apply a principle which ought never to have been invoked.

By invoking a theory of implied condition which was nothing else than a legal fiction, and by purporting to enlarge and extend its application to the “non-existence of a state of things,” even where such “state of things” was not even mentioned in the contract, the Court, in *Krell v. Henry*, extended the doctrine of *Taylor v. Caldwell* to the point where a literal application of it must inevitably undermine the sanctity of contract.

As has been mentioned, there is, so far as we are aware, no case in which performance has been excused in such circumstances simply and solely by an application of this form of implied condition. On the other hand there are several cases in which Courts have refused to make such an application of the principle.⁴⁸

But, unfortunately, there are many cases in which there has been a purported application of this doctrine to such circumstances, but which, on closer examination, prove to have been decided, as was *Krell v. Henry* itself, on some other principle of law. This has had the unfortunate effect of encouraging further attempts to invoke this principle, while at the same time obscuring the other principles of law.

As a result of the Coronation Cases the true application of at least two principles of law to the circumstances of supervening impossibility has been misunderstood. These are the doctrine of failure of consideration, and the doctrine of frustration. We have

⁴⁷ At p. 691. Even this reason for the decision fails to take account of the general principle that a partial failure of an entire consideration is a failure of the whole consideration. See on this an article entitled “Part Performance of Entire Contracts,” to be published shortly in the *Law Quarterly Review*.

⁴⁸ *Associated Portland Cement Mfrs., Ltd. v. Cory (William) & Sons, Ltd.* (1915), 31 T.L.R. 442; *Blackburn Bobbin Co. v. Allen & Sons*, [1918] 2 K.B. 467; *Larrinaga & Co. v. Société Franco-Américaine, etc.* (1923), 29 Com. Cas. 1; *Re Comptoir Commercial Anversois and Power, Son & Co.*, [1920] 1 K.B. 868.

already seen how the former principle has been obscured. The doctrine of frustration is dealt with in a forthcoming book,⁴⁹ and need not detain us here.

But the mischief of the Coronation Cases has not ended with this. In the succeeding article an attempt will be made to show how the application of the theory of implied condition to one group of Coronation Cases has not only caused one particular application of the doctrine of failure of consideration to be lost sight of, but has resulted in the establishment of a rule which is generally recognised to be unjust.

II. THE LESSEE'S CONTRACT TO PAY RENT

If the doctrine of failure of consideration can be applied to the facts of *Krell v. Henry*, what result does it give when applied to facts like those in *Paradine v. Jane*?⁵⁰ It was held in the latter case, and has been settled law ever since, that the fact that a lessee has been deprived of the possession of the premises, or even that these have been totally destroyed by accident, is no excuse for non-payment of rent in the absence of an express exception.⁵¹ This rule now applies not only to leased premises consisting of land and buildings (where land remains after destruction of the building) but also to leased premises consisting of a single room or storey of a building, which ceases to exist when the entire building is destroyed.⁵²

⁴⁹ McElroy, *Impossibility of Performance*. In our view the principle of "frustration" should be confined to cases of inordinate delay; it ought not to be applied to facts like those in *Krell v. Henry*.

⁵⁰ (1647) Aleyn 26. It will be recalled that this was an action by the lessor for rent. If in similar circumstances the lessor or lessee sues for breach of some obligation in the lease relating to the house, the destruction of the house would clearly be as much a defence as it was to the defendant in *Taylor v. Caldwell*—unless the destruction of the house is intended to be the very event that is to call the covenant into operation, as in the case of the covenant to repair.

⁵¹ It is otherwise in the Civil law and in the systems founded upon it. See Gottschalk, *Impossibility of Performance in Contract*, p. 1; Bell, *Principles of the Law of Scotland*, Sec. 1208; Gloag on *Contract*, 2nd ed., p. 348.

⁵² *Izon v. Gorton* (1839), 5 Bing. N.C. 501. But in the U.S. this distinction is drawn. Where the demised premises are totally destroyed (as would happen in the latter case if a fire destroyed the building) American courts relieve the tenant from liability to pay rent, apparently on the ground of a total failure of consideration; but where there is only partial destruction (as would happen in the former case, where land remains) no relief is allowed. See Williston on *Contracts*, 2nd ed., Vol. IV, s. 945, p. 2642. Williston criticises the decisions in the latter class of case and maintains that there ought to be a proportionate reduction.

Restatement, Contracts, s. 290, expresses the rule in the following wide terms: "Non-performance of a covenant by one party to a lease or other conveyance of land, unless performance of the covenant is an express condition, does not excuse the other party from performing his covenants further than the law of property governing the effect of eviction of the grantee or of waste by him provides." One of the illustrations given turns on the rule that there is no implied proviso for re-entry on non-payment of rent. But the qualifying words "unless performance of the covenant is an express condition" seem, for English law, to be rather too narrowly expressed. Cp. Woodfall, *Landlord and Tenant*, 24th ed., p. 894.

Since the approval of the rule in *Paradine v. Jane* by the House of Lords in *Matthey v. Curling* (1922)⁵³ its validity has been beyond challenge in the Courts. But it is still at least of academic interest to discuss whether it can be reconciled with the present rules of failure of consideration; and something may also be said on the more important question whether the rule should be reversed by legislation as a matter of policy.

The reason that has been alleged for the rule in several recent cases (in order to square it with the law of failure of consideration) is that the consideration for the tenant's covenant to pay rent is the grant by the landlord of an interest in the land, and so long as that interest remains undefeated by eviction by the landlord or by title paramount, the consideration is performed and the rent must be paid.⁵⁴ Perhaps the argument may be put like this, that just as the purchaser of land and buildings at a fee farm rent takes the risk of the buildings being destroyed, because he is the owner of them, so the lessee of land and buildings takes part of the risk of the buildings being destroyed, because he has, in a manner of speaking, part of the ownership of them. He is liable to pay the rent for the remainder of the term, but in the absence of express agreement is not liable to reinstate the premises.

This particular explanation of (or apology for) the rule in *Paradine v. Jane* is not, perhaps, perfectly satisfactory. Indeed, no explanation can save one from a certain amount of misgiving, when it is considered that the rule does not on principle apply to contracts to hire a chattel. If a hired chattel is destroyed before the expiry of the term, there is, it is submitted, a total failure of consideration which absolves the hirer from his duty to make the remaining payments.⁵⁵ If one looks at the substance of the matter, was there not a similar failure of consideration in *Paradine v. Jane*? One can perhaps say that a lease creates a right *in rem* whereas a contract of hiring does not; but it is rather artificial. Or one can say that the lessee in *Paradine v. Jane* still had possession of the land, even though the house on it was destroyed.

⁵³ [1922] 2 A.C. 180. For the application of the rule to equitable leases see Williams in McElroy, *op. cit.*, Chapter V.

⁵⁴ See *Grimsdick v. Sweetman*, [1909] 2 K.B. 740; *London and N. Estates v. Schlesinger*, [1916] 1 K.B. 20; *Whitehall Court v. Etilinger*, [1920] 1 K.B. 680. For the qualification concerning eviction see *Matthey v. Curling*, [1922] 2 A.C. at pp. 227, 235. The courts once took a step towards the ideal solution of the problem of partial failure of consideration by holding that where a lessee is evicted by title paramount from part only of the demised premises, the rent payable under the *reddendum* is apportionable: *Stevenson v. Lambard* (1802), 2 East 575; *Matthey v. Curling*, [1922] 2 A.C. at 185, 232.

⁵⁵ There are, however, some difficult cases on time charterparties: see Williams in McElroy, *op. cit.*, Chapter V, pp. 102-7.

Yet what he really expected, as the landlord well knew, was the enjoyment of a house, and that he failed to get. In any event the argument cannot justify the application of the rule to the destruction of a flat that is demised without land. Finally, it must not be thought that the doctrine of failure of consideration is necessarily inapplicable to a contract under seal. It is true that such a contract is binding although voluntary, but if there be in fact consideration for it, and if the consideration fails, there is no reason why the doctrine of failure of consideration should not apply.⁵⁶

Putting aside the theory behind the rule, how has it turned out in practice? Not, it seems, very well. Perhaps the strongest objection to it is that it does not fully accord with the practice of insurance. Let us develop this point a little more fully.

We are not concerned with the case where either landlord or tenant has covenanted to rebuild in the event of destruction.⁵⁷ Here the covenantor will naturally insure (whether by the terms of the lease he be bound to or not), and the insurance moneys will be spent in rebuilding the premises. The rule in *Paradine v. Jane* is of importance only during the period of rebuilding, and its reversal by statute would likewise be of importance only during this period.

The case with which we are really concerned is that where neither landlord nor tenant has covenanted to rebuild. Here, at least if the residue of the term is fairly short, it is the landlord who will most naturally insure, lest at the end of the term he have a ruin restored to him. Yet the rule in *Paradine v. Jane* puts part of the risk of destruction on the tenant, for he remains liable to the landlord for rent due between destruction and the end of the term. To this extent, therefore, the landlord has no insurable interest; and if the tenant desires protection he must effect a separate insurance on his own account. It has even been held that although the landlord does insure the premises to their full value, and upon the destruction of the premises receives the sum insured, still the tenant has no equitable claim to have this sum applied in reinstating the premises.⁵⁸ Thus there is no way in which the tenant can make sure of a fund

⁵⁶ Cp. *Y.B.B.* (1292), 20 & 21 E. 1, R.S. 367; (1294), 21 & 22 E. 1, R.S. 599; *Greville v. Da Costa* (1797), Peake Add. Cas. 113.

⁵⁷ A covenant to repair is regarded as such an agreement: *Matthey v. Curling* (*cit. sup.*). But see now, as to war damage, the Landlord and Tenant (War Damage) Act, 1939, 2 & 3 Geo. VI, c. 72, Part I.

⁵⁸ *Leeds v. Cheetham* (1827), 1 Sim. 146, 150; *Lofft v. Dennis* (1858), 1 E. & E. 474; *Westminster Fire Office v. Glasgow Provident Society* (1888), 13 App. Cas. 699. It is a pity that provision was not made for this case in s. 47 of the Law of Property Act, 1925.

for rebuilding the demised premises unless he himself insures to their full value.

To the last sentence, however, there is one qualification. By the Fires Prevention (Metropolis) Act, 1774, the tenant seems to have a right against the landlord's insurance company that the sum insured shall be applied in reinstating the premises.⁵⁹ At first sight this may seem to rob the rule in *Paradine v. Jane* of importance where the landlord insures, but that it does not do so will be apparent from the following considerations. (1) The tenant must make a positive request to the insurance company to reinstate the premises; if he omits to do so the company is justified in paying over the insurance money to the landlord, who will himself be under no duty to rebuild. (2) The Act is confined to damage by fire. (3) The insurers cannot be compelled to expend more upon reinstatement than the amount of the insurance. Now when a landlord lets buildings on lease without covenanting to repair, it is open to his insurance company to argue that his insurable interest does not extend to the whole value of the property. Owing to the effect of *Paradine v. Jane*, it is quite possible that the company is liable only to the extent of such a sum as would, if put out at interest, amount by the end of the lease to the value of the premises. Such a sum would not be sufficient to restore the former buildings. In conclusion, (4) it may be observed that it is still not absolutely certain that these provisions of the Act are not confined to London.

Despite the Act, therefore, it remains true to say that in the case under discussion the rule in *Paradine v. Jane* effects an awkward splitting of the risk. The disadvantages of this may be summed up in three sentences. First, it is a trap to the unwary lessee, because part of the risk is thrown upon him in circumstances when (since he is not bound to repair) he will not naturally think of insuring. Second, it requires the effecting of two policies of insurance if the risk is to be completely covered. And third, it takes away from the landlord the normal business incentive to see that his property is rebuilt as soon as possible after destruction.

This argument from the practice of insurance hardly applies to war risks, which tend to be uninsurable. But the very uninsurability of war risks is an argument for excluding them from the scope of *Paradine v. Jane*, and the argument, after having

⁵⁹ See *Wimbledon Park Golf Club v. Imperial Insurance Co.* (1902), 18 T.L.R. 815; and see generally on the Act Welford and Otter-Barry, *Fire Insurance*, 3rd ed., pp. 335-7.

been advanced by a Committee⁶⁰ appointed to consider the question, was approved by Parliament when it passed the Landlord and Tenant (War Damage) Act, 1939. Part II of this Act provides that where land comprised in a lease is unfit by reason of war damage, the tenant shall have power to disclaim the lease or to retain it on altered terms. There are detailed supplementary provisions.

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GLANVILLE WILLIAMS.⁶¹

⁶⁰ See the Report of the Committee on Repair of Premises damaged by Hostilities, Cmd. 5934 of 1939, reviewed (1939) 3 *Modern Law Review* 58. The argument is specifically advanced by the Committee only in the first part of the Report dealing with the covenant to repair, but apparently it applies equally to the second part dealing with the covenant to pay rent.

⁶¹ It may be said that the first author is principally responsible for the first part of this article (*Krell v. Henry*), and the second author for the second (lessee's contract to pay rent).

THE MOVEMENT FROM STATUS TO CONTRACT¹

SIR HENRY MAINE'S famous generalisation of the movement up to his time of progressive societies from status to contract² is widely accepted as an axiom of social and legal evolution, but the time for a critical review of the dictum in its relation to the Common Law is long overdue. The meaning of the statement is clear: that the rights and duties, capacities and incapacities of the individual are no longer being fixed by law as a consequence of his belonging to a class, but those former incidents of status are coming more and more to depend for their nature and existence upon the will of the parties affected by them; and the remedy for breach of those incidents is becoming increasingly contractual in nature.³

Maine's invaluable work lay chiefly in research into Roman and Hindu Law. His writings almost always convey a feeling of remoteness from the Common Law. In addition to his general interest in the institutions of Roman Law, it is clear that in developing his progressive principle of status to contract he was particularly influenced by the family law of the later Roman Empire, though his theory of the familial origins of society is based on the wider organisation of many ancient communities. "Starting," he wrote,⁴ "as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relation of the Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals." The movement in Roman Law was indeed away from the status relation of the Family: but there are two sides to Maine's thesis, and a movement away from status does not necessarily connote a movement in the direction of contract. Particularly in Roman Law, where the idea of contract was to a large extent undeveloped, promises were enforced in the form of pacts on the basis of *bona fides*, not of the autonomy of the will. Free will is a theory which one may be strongly tempted to read back into legal history; but

¹ An extract from the author's book, in course of writing, *Status in the Common Law*.

² "If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract." *Ancient Law* (Pollock's Ed.), p. 182.

³ Markby, *Elements of Law* (6th ed.), para. 180.

⁴ *Ancient Law*, p. 180. See also *id.*, pp. 181-2: "All the forms of Status taken notice of in the Law of Persons were derived from, and to some extent are still coloured by, the powers and privileges anciently ~~existing~~ residing in the Family."

(RESIDING)

it is a theory out of accord with the facts. It is a doctrine of Savigny, not of Justinian. Even with the expansion of the Roman Law of contract to meet the needs of a growing industrial and commercial population, *bona fides* never lost its importance as the basis of the duty to perform obligations, a theory which has been connected with the Stoic idea of duty.⁵ Status in the Common law, moreover, has a wider basis than the family: its basis is in part the family, but to a far greater extent it lies in estates and tenure of land, and even more remote than the tenurial relation of man to man is the contractual basis on which feudalism, through land holding, is founded.

Most of the few who have given consideration to Maine's doctrine have found it necessary to limit it in some way to fit the facts of modern society.⁶ But the most important limitation placed upon the doctrine is that made by Maine himself, in which he cautiously restricts its application by the word "hitherto." We cannot condemn a historian for refusing to assume the mantle of a prophet. The movements and tendencies since Maine wrote in the 1860's are more complex and difficult than they then were, in view of the later socialisation of the law; and the failure of his maxim to apply to modern conditions is therefore no criticism of its contemporary validity. Maine himself excluded from his dictum those personal conditions which resulted, immediately or remotely, from agreement,⁷ a limitation which clearly involves the status resulting from marriage and, it may be argued, also excludes almost the whole of status in the Common Law resulting from the feudal agreement between lord and man. So far as the Common Law is concerned very little remains, if one subtracts from our law of status those personal conditions resulting on the one hand from feudal land tenure and on the other indirectly from private agreement. A confusion of thought is apparent in Maine's refusal to regard as status legal conditions resulting from agreements of certain kinds, and particularly that of marriage, for it is not the agreement itself which secures the status, but the State alone when the agreement has been both made and performed according to its terms.

The importance of feudal organisation in the development of the English law of status must be conceded as a fact, since its implications, which have been worked out at length elsewhere, cannot be considered within the scope of a short article. Feudalism

⁵ Pound, *Interpretations of Legal History* (1923), p. 53.

⁶ See, for example, Salmond and Winfield, *Law of Contracts* (1927), 447; Vinogradoff, *Collected Papers* (1928), II, 230; Pollock, note L to Maine's *Ancient Law*, p. 190; Holdsworth, *History of English Law* (4th ed.), III, 455.

⁷ See note (2) *supra*.

in England repudiates Maine's dictum in three of its major characteristics: in its basic foundation on agreement; in its public or semi-public nature; and in the intimate dependence of status upon estate. The basis of the feudal community was a relation between lord and man involving services of various kinds by the latter in return for his protection by the former. Thus, behind that relation stands an element of contract—not contract quite as we understand it to-day, but a common understanding of the assumption of mutual rights and obligations.⁸ Basing his theory of status, moreover, chiefly upon the evolution of domestic relations, Maine disregarded, or perhaps never consciously adverted to, the public nature of the conception. So far as the Common Law is concerned that feature of status is predominant in both the past and present times. Historically it is impossible to say that in the Common Law the movement of English society, which we assume to have been progressive, has been from status to contract. In English law status probably preceded estate in any person, and in the connection of the two ideas into the feudal relation based on tenure the element of contract played no small part. This contractual basis of feudalism led indirectly, through the doctrine of estates and tenure, to the creation of definite classes, or status, identified by the possession of generalised rights and obligations, originally contractual but becoming upon the grant of the estate static. Incidents of contract through the granting of an estate thus became incidents of status. The movement was not from status to contract, but from contract to status.

To the extent of the dependence of a man's estate upon his status Maine's thesis is indirectly confirmed for, through possession of an estate there developed a power and a measure of contractual disposition of property. Even in feudal times methods of dealing with land were being quickly evolved; and attempts were being made by contract to vary or discharge the incidents of status. The commutation of villein services into rent, particularly after the Black Death, and the movement towards enfranchisement of villein, and later copyhold, land was indeed a movement from status to contract, though hardly in the sense intended by Maine. In later centuries a continuation of this movement was in favour of nineteenth century individualism;

⁸ "But the earliest feudal communities were neither bound together by mere sentiment nor recruited by a fiction. The tie which united them was Contract, and they obtained new associates by contracting with them. The relation of the lord to the vassals had originally been settled by express engagement, and a person wishing to engraft himself on the brotherhood by *commendation* or *inféudation* came to a distinct understanding as to the conditions on which he was to be admitted." *Ancient Law*, p. 385.

and although we have now passed through that movement and are now in one very different in purpose, the dependence of estate upon status has not yet passed completely from our law. The status of an alien, for instance, still partially governs his estate. His inability to own the whole of, or any share in, a British ship is a survival of his original proprietary disabilities, though a survival so easily evaded by the device of legal incorporation as to be of little practical significance. The importance of status decreased as, by the fifteenth century, estate came to be regarded as property, not as a status. An important factor in this changed attitude was the movement away from the land; a movement which, starting in the middle of the fourteenth century, gradually increased in volume until the commercial, industrial and colonial expansion of the sixteenth and seventeenth centuries drew thousands of agricultural landholders to the more alluring prospects of the towns. Such personal privileges as to-day depend on estate are scarcely sufficiently numerous or sufficiently important, not affecting a person's general legal condition, to be called a status. But they are a survival of the public nature of status depending on estate. Thus, even in our modern democratic State, Parliamentary franchise depends on occupation of a residence, occupation of business premises of the annual value of ten pounds, being the husband or wife of such occupier of business premises, or being a university graduate. For local government franchise occupation of premises for a period of at least three months is essential.⁹ The various stages in the movement of English law between contract, status and estate to the end of the seventeenth century may be summarised as follows: status affecting contract leading to estate: estate in turn affecting status: separation of estate and status in favour of freedom of contract. Of these steps in the progress of law from the eleventh to seventeenth centuries, the first two are the most important, as other influences were at work in extending freedom of contract, so that the movement may be reduced without serious loss of accuracy to one from status to estate.

The further progress of English law in the direction of contract between the seventeenth and late nineteenth centuries came not only through the separation of estate and status, but, at a later date, through the substitution of a contractual for the relational basis in the associations of commercial and industrial, and to some extent, domestic life. The seventeenth and eighteenth century philosophy of reason favoured a contractual basis of undertakings, but in its anxiety to bring legal into accord with

⁹ Representation of the People Acts, 1918 to 1928.

natural facts, did not seek the conversion into a contract relationship of those forms of status then regarded as based upon natural incapacities. This philosophical rationalism received a practical stimulus from the Industrial Revolution of the later eighteenth and early nineteenth centuries which changed its emphasis from one of reason to one of individual liberty. A second migration of population from country to town took place, and the older relationships tended to collapse. Until the nineteenth century the position of an apprentice, for example, had been similar to that of any other member of his master's family. The imposition of vicarious liability on the master was thus based on a principle of family status. The position of domestic servants was very similar. The Common Law, until the early nineteenth century, was a law of relationships, many of status, some of less than status; and upon those relationships of status vicarious liability was founded. Hence it is commonly found that they involve ideas either of natural incapacity of the party imposing vicarious liability, as in the case of an infant upon his parent, or of pecuniary benefit to the party upon whom the liability is imposed, as a husband in relation to his wife or a master as to the acts of his servant. The nineteenth century saw the breakdown of many features of these bases of liability. In an expanding industrial community the old relation of master and servant was made to give place to a great extent to a contractual basis by an economic interpretation of the new philosophy of freedom of the will. On this interpretation the doctrine of common employment was enunciated in 1837,¹⁰ and, together with the doctrine of *volenti non fit injuria*, developed later into a cause of great hardship to employees who had, in fact, such freedom of the will that they could accept hazardous employment with all its attendant risks, including that of incompetent fellow-servants, or starve. The judicial tendency of the time was "to refer if possible all obligation to the party on whom it was laid," and to consider "duties imposed by the policy of law on a relation created by contract as founded on some fictitious term in the contract creating the relation,"¹¹ though even as early as 1859 doubts were being expressed as to the true nature of this supposed freedom of contract. In *Mumford v. Gething*,¹² for instance, Byles, J., remarked, "It is a popular, but in my judgment a mistaken, notion that parties ought to be at liberty to enter into contracts after their own fashion." Although the doctrine of

¹⁰ *Priestley v. Fowler*, 3 M. & W. 1.

¹¹ Bohlen, *Selected Essays in the Law of Torts* (1924), p. 515.

¹² 7 C.B. (N.S.) 320.

common employment represents the judicial response to the demand of employers for a reduction of the vastly increased Common Law liabilities imposed upon them by the employment of hundreds upon machines in place of individuals working with their own hand tools, the subsequent reaction is evidenced by such legislation as the Fatal Accidents Act, 1846, and the Employers Liability Act, 1880. The corollary doctrine of *volenti non fit injuria* received a heartening judicial delimitation in *Smith v. Baker*,¹³ but only after a century of triumphant individualism, and at a time when freedom of contract was seen to be rather more complex than at first conceived. The other aspect of this movement was the claim of employees to freedom from the obligations of status and to considerations as free-willing individuals. Once this movement from status to contract had begun, "... no common-law court could have been found, of whomsoever composed, to turn back to the old dependent idea and impose a liability to take care of the employee on that basis."¹⁴

• This nineteenth century emphasis on the freedom of the individual will, developing through Kant to Hegel's idea of the full realisation of liberty, was in its social and industrial aspect greatly influenced by ideas of the French Revolution. But it was not limited to industrial changes. It appears in the gradual emancipation of the married woman.¹⁵ It appears in the judicial approval of the popular saying, once possibly true, that an Englishman's home is his castle.¹⁶ Equity has always had a more realistic appreciation than the Common Law of true freedom of contract, and its doctrines of relief from penalties and clogs on the equity of redemption of a mortgage are familiar instances of that attitude. The Court of Appeal has recently demonstrated this appreciation of true contractual freedom in a case involving postponement of the equitable right to redeem for a period of forty years, which was upheld as between mortgagor and mortgagee who were wealthy companies on an equal contractual footing and capable of obtaining the best legal advice.¹⁷

Although lack of historical perspective makes it impossible fully to assess the implications of a movement through which the Common Law is now passing, two modern tendencies relevant to status are clear. On the one hand the movement in domestic

¹³ (1891), A.C. 325.

¹⁴ Pound, *Economic Interpretation and the Law of Torts*, 53 Harvard L.R. 365, at p. 376.

¹⁵ Vinogradoff, *Collected Papers* (1928), II, 232.

¹⁶ See *Bradford Corporation v. Pickles* (1895), A.C. 587.

¹⁷ *Knightsbridge Estates Trust v. Byrne* (1939), 4 All E.R. 618 (C.A.), affirmed by House of Lords on another ground (1940), 2 All E.R. 401. See author's note on this case, *The Conveyancer*, June, 1940, p. 428.

status is away from dependence on the head of the family, with its corollary of vicarious liability, towards full individual legal capacity; on the other, State interference in the terms and conditions of employment in industry has given rise to a new type of personal legal condition which bears many of the features of a status.

Maine favoured the generally accepted basis of status relationship, namely, the inability of persons subjected to status to form a judgment on their own interests.¹⁸ His failure to consider the function of public law and public policy in the imposition of status led him to assume a natural incapacity as the only justifiable basis of status. As Pollock has well said,¹⁹ Maine's argument would not apply to married women and infants, and although Maine probably never intended it to apply to the former, his test of status remains inadequate. The status arising from marriage has undergone great changes in the last fifty years. The women's property now belongs to her instead of to her husband,²⁰ and she has full criminal,²¹ contractual and tortious liability.²² But most of these respects in which her legal position has been assimilated to that of the normal adult have affected her absolute status as a married women rather than her relative status as a wife. Her contractual capacity and tortious or criminal liability are of deeper concern to the community at large than to her husband; while the converse is the case in respect of her increased proprietary rights. The distinction is of importance, for it shows that the incidents of the relational status of husband and wife, save as to property, have not been materially affected by the emancipation of the married woman to anything like the same extent as the incidents of the married woman's absolute status. The marital status itself has not in English Law undergone any fundamental change, though in certain American States a strong contractual attitude towards marriage, evidenced by the ease of its dissolution, reduces but does not destroy the existence of the marriage status. Faced with the task of determining the nature of a Russian marriage which could be dissolved by consent and a formal act of registration, the English Court of Appeal accorded to it recognition as a complete and Christian marriage; for the ease with which the union may be dissolved (thought the Court) does not affect its nature while it lasts.²³ Maine's test

¹⁸ *Ancient Law*, p. 181.

¹⁹ *Id.*, note L.

²⁰ Married Women's Property Act, 1882.

²¹ Criminal Justice Act, 1925, s. 47.

²² Law Reform (Married Women and Tortfeasors) Act, 1935.

²³ *Nachimson v. Nachimson* (1930), 99 L.J. Probate 104 (C.A.).

could hardly apply to the status of infancy above the age of seventeen, for even below that age the law does not deny to the infant a discretion to make a lifelong change of status, even providing for the overriding, on appeal to a court, of parental opposition.²⁴ A large number of infants are serving in the armed Forces of the Crown, and war makes every one of them an adult in duty and responsibility and character. The test of correspondence of status with natural incapacity is thus inadequate, though not inapplicable. Its application to the status, for example, of the alien, the undischarged bankrupt and the corporation demonstrates the limitations of its validity, and the measure of that invalidity in our present system is the extent of Maine's failure to recognise the factor of public and social interest inherent in the conception of status.

Through the recognition by the legislature and judiciary of the modern purpose of law as the regulation of and active participation in social control and industrial and commercial organisation, a movement from contract to status has become apparent. The aim of law throughout the greater part of the nineteenth century was to secure individual rights of property and to give effect to the freest expression of the will in contractual undertakings. The law stood by as umpire or referee to state the rules of the game of civilised life, to see that the game was played according to those rules and, when disputes arose, to intervene neither on one side nor the other. This century has seen the early growth of a different conception of law; a conception in which law is gradually, and in England slowly, changing its purpose from the upholding of an abstract autonomy of the will and a concrete securing of gains and acquisitions to an active social and public concern in the protection from exploitation of the economically weaker members of society,²⁵ the regulation of terms and conditions of contracts of employment,²⁶ the imposition on the community as a whole of the responsibility of caring for its less fortunate members, stricken by old age, ill-health or unemployment,²⁷ the securing of reasonable remuneration to producers in farming and agriculture²⁸ and, most important among the earliest manifestations of this new spirit, the introduction

²⁴ Age of Marriage Act, 1929.

²⁵ Moneylenders Acts, 1900 and 1925; Hire Purchase Act, 1938.

²⁶ Coal Mines (Minimum Wage) Act, 1912, *McCarthy v. Penrhyber Navigation Colliery Co.* (1938), 107 L.J.K.B. 249; Factories Act, 1937; Young Persons (Employment) Act, 1938.

²⁷ Unemployment Insurance Acts, 1919-1940; Old Age Pensions Act, 1919; National Insurance Act, 1911.

²⁸ By a series of well-intended, but not universally popular, Marketing Schemes, e.g. of milk, potatoes, pigs and fish.

of compensation by employers to workmen for accidents arising out of and in the course of their employment.²⁹ One would long hesitate to deny the influence of the Darwinian maxim of the survival of the fittest in this growing legal consciousness of the unfairness of maintaining an abstract principle of contractual equality. As in biology the physically stronger, so in law the economically stronger, would prevail and survive; and law was neither so amoral nor so immune from the discoveries of a scientific age that it could continue to regard with equanimity a situation which equity, in a limited manner, had always striven to rectify.³⁰ Public policy decides whether any matter is one for private agreement or of status. In such contracts as those of service the modern tendency has been "to withdraw the matter more and more from the domain of contract into that of status,"³¹ so that an ever-increasing state regulation of industrial undertakings is resulting in the relation of master and man becoming largely one of status.³² Duguit has contended that the increasing system of group-syndicalism and the division of labour tend towards the formation of status groups in mediaeval and modern society. One may properly ask whether a true question of status arises here, since there is individual freedom in joining and leaving the group. As to this, it is suggested that the static nature of mediaeval society supplies an affirmative answer for the former period, while in modern times the distinction between a legal condition capable of voluntary assumption and rejection and that which, once voluntarily acquired, cannot be so rejected, answers in the negative most of the cases in which a modern industrial status is said to exist. In any case the increase of commercial and industrial status is natural in a modern State which has to deal with large groups and classes. A corresponding tendency of the age is towards the standardisation (forgive the word) of commercial contracts,³³ so that if one wishes, for example, to buy a railway ticket, to obtain goods on hire purchase or to take a lease of a modern flat, one's liberty of contract is restricted to a simple choice of unqualified acceptance of all the usual terms or of complete failure to obtain the ticket, goods or flat, as the case may be. Hence, it has been found necessary to impose safeguards for the protection of intending purchasers or lessees,

²⁹ Workmen's Compensation Acts, 1897 to 1925.

³⁰ It is significant that the traditional rivalry between Law and Equity for the most part ended in 1873 (Judicature Act).

³¹ Salmond and Winfield, *Law of Contracts* (1927), p. 12.

³² See also Holdsworth, H. E. L., III, p. 455: "... the growth in progressive societies of the complexity both of the state and of social, commercial and industrial relations has led to the growth of new varieties of status."

³³ See Prausnitz, *Standardisation of Commercial Contracts* (1937).

in the form of statutory and independent regulation of such matters as the conditions and rates of travel,³⁴ forms and conditions of hire purchase agreements³⁵ and implied obligations on lessors of small flats or dwelling-houses to keep them in habitable condition.³⁶

When in 1898 the late Professor A. V. Dicey delivered a course of lectures at Harvard upon the relation between law and public opinion in England during the nineteenth century, his unerring insight showed him that in consequence of the first English Workmen's Compensation Act of the previous year, "The rights of workmen in regard to compensation for accidents have become a matter not of contract, but of status."³⁷ But however true it is that obligations of the employer-workman relation are now very largely determined by the law; it is less certain that the two parties to that relation can be said to have a full legal status. They can voluntarily enter into and terminate their relationship, and on the duration of their agreement depends the life of their special status. A characteristic feature of true status is its legally imposed condition which cannot be got rid of at the mere will of the parties without the interposition of some agent of the State, administrative, legislative or judicial.³⁸ As both employer and employed can of their own free will relinquish their special legal condition by ceasing to be employer or employed, that condition falls short of status in its usual sense, but is so different from a purely contractual relation in its approach to legal status as at least to merit the description of legal condition in the nature of a status. Towards the assimilation of that condition to a true status the state of emergency created by Britain's wars of 1914 and 1939 has given a powerful impetus. The effect of the Munition Factory Acts of 1915, 1916 and 1917 in prohibiting strikes and lockouts and substituting a system of public law for one of private contract was to create for both workmen and employers in the munitions industry a true legal status which adhered independently of the will and could not voluntarily be relinquished.³⁹ This precedent has been followed in the present war by a vast system of industrial, commercial and agricultural mobilisation and control through the administrative agencies of such Government Departments as the Ministry of Labour and National Service and the Ministry of Supply. An employer is

³⁴ Through the Railway Rates Tribunal.

³⁵ Hire Purchase Act, 1938.

³⁶ Housing Act, 1936, s. 1.

³⁷ Dicey, *Law and Public Opinion in England* (2nd ed.), pp. 283-4.

³⁸ See *Nachimson v. Nachimson* (*supra*).

³⁹ See Vinogradoff, *Selected Papers*, II, pp. 237-8.

forbidden to engage any coal miner or agricultural worker for any work other than that of the worker's normal occupation, and every such engagement must be made through the State medium of an employment exchange.⁴⁰ In both mediaeval and modern society, as Durkheim has shown, the division of labour has tended towards the formation of groups on a basis of status. The decentralization of governmental powers and the syndicalism urged by Duguit⁴¹ as an effective means of social organisation present a parallel tendency in society to the division of labour in industry, but in neither case, it is submitted, does a true form of status arise. In time of war the status of aliens, friendly and hostile, swells in importance, and is complicated by the presence of large bodies of refugees from States with which this country is at war. But whether in times of war or in times of peace, the State is more and more realising its function as a leader in social work rather than as a passive guardian of its subjects' contractual rights. Freedom of contract is giving way in industry and agriculture to social welfare, and the maintenance of a fairer standard of work and living.⁴²

A final instance of this contemporary movement of groups from a contractual to a status basis is found in the remarkable growth of corporate organisation. In all progressive societies individuals have banded together for common undertakings, and the inconvenience of their collective contracting has led to a call for the legal personification of their group. The various Companies Acts of the past eighty years have sought to satisfy the needs of an increasingly industrial and commercial community for greater ease of incorporation and limited contractual liability. All legal persons have legal status and very little else, and this great movement towards incorporation is in a special sense a movement from contract to status. But it should not be forgotten that, even in the absence of legal incorporation, a group of persons may enjoy a special status quite distinct from those of individual members. Pollock,⁴³ for example, considered that the Trade Disputes Act of 1906 conferred "a new and unexampled status on combinations of both employers and workmen" in exempting such combinations from tortious liability.

So far as the Common Law is concerned Maine's celebrated dictum was far from true in 1861 when he published *Ancient Law*,

⁴⁰ S.R. & O., 1940, No. 877.

⁴¹ *Droit Social*, 43; see Allen, *Law in the Making* (2nd ed.), pp. 356-7.

⁴² By a recent Order (June, 1940) the minimum rate of 48s. a week has been fixed as the wages of all male agricultural labourers. See also Vinogradoff, *op. cit.*

⁴³ *Ancient Law*, note L., p. 193.

and it is even less true to-day. The limitations which he placed upon his maxim rendered it much less of a brilliant generalisation than has been commonly realised, for his exclusion of status based upon agreement eliminated every personal legally imposed condition which was based on some other ground than natural incapacity. The Common Law is, in various senses, a peculiar thing; and a principle based upon the evolution of Roman family law is hardly likely to apply perfectly to a system based fundamentally on the evolution of feudal land tenure. But the dictum can at least claim a half measure of validity. The movement of the Common Law to 1861 was away from status. So far as concerned the feudal basis of status, the movement lay towards estate; only with regard to the purely non-tenurial status, such as that of craftsman and apprentice, was there a true movement in the direction of contract, a movement of sweeping proportions in the lifetime of Sir Henry Maine. In true domestic status, the status depending upon relationship of blood or affinity, there was little tendency in the direction of contract. The most prominent movement has been towards legal equality of husband and wife: that, however, evidences no contractual tendency, but only an equalisation of legal status to bring personal legal condition into line with a realistic factual situation. The unconscious growth of concepts of natural law and fair dealing in the twentieth century severely reduces the validity of Maine's maxim for our age. The movement towards the socialisation of the Common Law which has been noted is yet in its early stages. Its manifestations will be more apparent and of infinitely wider scope in the years after the present war, just as the struggle of 1914-1918 gave birth to vast and unforeseen social and legal changes. Every indication is of an increasing emphasis on status. Maine believed that the movement from status to contract was characteristic of progressive societies. The further movement from contract to status may characterise a social retrogression or a movement to a plane of legal progress higher than Maine conceived. The history and spirit of the Common Law give every assurance that the second possibility embodies the future of our legal system.

R. H. GRAVESON.

ASPECTS OF THE LAW RELATING TO COMPANY DIVIDENDS

THE development of the joint stock company with limited liability has enabled the small owner of capital to participate in large scale business enterprises. With the democratisation of investment increasing numbers of individuals depend, for part of their incomes, on dividends received from joint stock companies. A study of the law relating to company dividends, which may affect the magnitude of the incomes of a considerable section of the community, is therefore of some importance. Such a study is interesting, too, because in this field the law has had to contend with problems which are more directly within the province of another profession, accountancy, the rise of which is closely linked with the development of the company.

The main problem in the law relating to company dividends is the establishment of satisfactory criteria for the determination of the size of the dividend fund.¹ It is the purpose of this paper to consider to what extent and in what manner the law has laid down the necessary criteria. Further, to indicate whether the criteria may be considered satisfactory or not, some of the consequences of the present state of the law will be considered.

From the legal criteria it should be possible to decide, firstly which categories of a company's receipts and which increases in the values of its possessions may be included in the calculation of the dividend fund. There should also be an indication of the categories of expenditure and declines in asset values which have to appear as subtracting items in the computation of the dividend fund. It is not intended to discuss the legal decisions on the first point in any detail. It is sufficient to point out that the decisions in *Lubbock v. British Bank of South America*² and *Foster v. New Trinidad Lake Asphalt Co.*³ make it clear that all the receipts of a company, other than those connected with the issue of its shares to its shareholders, may be included as positive items in the calculation of the dividend fund. The problem is accordingly simplified so that it is only necessary to ascertain

¹ "Dividend Fund," as used here, does not refer to the actual stock of cash out of which dividends *can* be paid. It is used to indicate the maximum amount which, according to the legal criteria, *may* be paid out to shareholders as dividends, irrespective of whether there is sufficient cash or not.

² (1892), 2 Ch. 198.

³ (1901), 1 Ch. 208.

the nature of the items which, in any period, have to be subtracted from the receipts of that period.⁴

1. The Development of Dividend Rules

Nowhere in the succession of Companies Acts can any direct reference to the nature of the dividend fund be found. The Legislature has thought it unnecessary or unwise to lay down definite rules or even general principles for the computation of the fund. It has been left to the judges to settle the questions which were bound to arise. The judges, however, could not or were not disposed to devise rules without attempting to justify them by reference to the supposed intentions of the Legislature, on a matter on which it had never expressed its opinion. It was believed that the Legislature's views on dividends could be divined from the tenor and general provisions of the Acts. And history has shown that a reading of the Acts could suggest different intentions on the part of the Legislature to different judges.

A single unifying idea runs through the decisions in dividend cases before the year 1889. This idea was premised on the view that the provisions of the Acts regarding the capital of a company, and more especially its reduction, made it clear that the Legislature would have frowned upon any dividend payment which would have left the company with a sum of assets less, in value, than its nominal paid-up capital. It was argued that the paid-up capital of a company could be used only for the furtherance of the declared objects of the company, which did not include the return to the shareholders of the capital they had subscribed. Moreover, the statutory ban on the reduction of capital, except under the strict supervision of the Courts, was held to imply that it was not legal to reduce the capital by returning it to the shareholders, without safeguards, in the guise of dividends. The argument is clearly stated by Jessel, M.R., in *In re Exchange Banking Company (Flitcroft's case)*:⁵ "A limited company by its memorandum of association declares that its capital is to be applied for the purposes of the business. It cannot reduce its capital except in the manner and with the safeguards provided by statute, and looking at the Act 40 & 41 Vict. c. 26, it clearly is against the intention of the Legislature that any portion of the capital should be returned to the shareholders without the statutory conditions being complied with. A limited

⁴ The judgment in *Ammonia Soda Company Ltd. v. Chamberlain* (1918), 1 Ch. 266, suggests that some increases in the value of a company's assets may be added to the current receipts. See below, p. 284.

⁵ (1882), 21 Ch.D. 519 at p. 533.

company cannot in any other way make a return of capital, the sanction of the general meeting can give no validity to such a proceeding, and even the sanction of every shareholder cannot bring within the powers of the company an act which is not within its powers."

In formulating this doctrine the judges were primarily concerned with the protection of the creditors of a company. Continuing his judgment, Jessel, M.R., said: "One reason is this—there is a statement that the capital shall be applied for the purposes of the business, and on the faith of the statement, which is sometimes said to be an implied contract with creditors, people dealing with the company give it credit. The creditor has no debtor, but that impalpable thing the corporation, which has no property except the assets of the business. The creditor, therefore, I may say, gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders."

The desire to see that the creditors' security, the capital, was not frittered away by its repayment to the shareholders either as dividends or in any other way, excluded almost every other consideration. In *In re Alexandra Palace Company*⁶ the Court would not be swayed by the contention that it was necessary to pay preference dividends out of capital in order to ensure the continuation of the company's undertaking. In *Trevor v. Whitworth*⁷ (not a dividend case) the argument that the reduction of the company's capital by the purchase of its own shares was legitimate, being a question of "domestic management and the object being to keep the company a family concern" was dismissed by Lord Herschell's statement that even where "it was considered for some other reason desirable in the interest of the company to do so," "the result to him (the creditor) is the same."

It appears, therefore, as if company directors in the period before 1889 were confronted by a rigid rule forbidding any dividend payment which would have reduced the remaining assets below the figure of the company's nominal paid-up capital. In other words, the rule, *strictly interpreted*, meant that from current receipts (plus the accumulated dividend fund, if any) there had to be deducted every decrease in the value of the assets of the company.

However, it would not be correct to suppose that the early

⁶ (1882), 21 Ch.D. 149.

⁷ (1887), 12 App. Cas. 409.

statement of the law was free from ambiguity, or that in practice it must have led to results which it may appear to indicate. The rule that paid-up capital has to be maintained intact may be interpreted to mean that the company's assets, if sold for cash, should realize an amount at least equal to its paid-up capital. Or it may mean that the value of the assets to the continuing enterprise should be at least equal to its paid-up capital. "Value" is a word of many meanings, and there is no hint in the series of decisions as to which "value" of the assets had to be maintained intact. The difficulty was apparently overcome by accepting the accountant's conception of valuation,⁸ which already in this early period was markedly different from any layman's idea of valuation. Thus the "value" of assets such as plant and machinery, land and buildings was taken to mean their cost to the company; fluctuations in the market values of these assets were ignored, though it was customary to deduct from the cost a fraction purporting to measure the depreciation of the assets through wear and tear and the passage of time.⁹ The accounting "value" of an asset could exceed or fall short of its market value, or the price which a continuing enterprise would have paid for it. Moreover it was common to include expenditure on preliminary formation expenses as a valuable asset. The reason for this practice, according to Pixley,¹⁰ was that "it would be unfair towards the business of the first year to charge the whole amount against its Revenue Account," or in other words, that to treat the whole amount as a deduction from gross receipts may have left nothing for dividends in the first few years. By attaching a specialised meaning to the "value" of a company's assets some of what were regarded as undesirable consequences of a strict interpretation of the legal doctrine were avoided. The acceptance of accounting valuation conventions may explain why accountants were satisfied¹¹ with a rule which, on the face of it, was opposed to some of the basic practices of accounting.

Any rule which makes the payment of dividends contingent upon the maintenance of the remaining assets above a certain level (in this case the nominal paid-up capital) has the disadvantage that the "values" of some assets are never anything more than estimates which subsequent events may falsify. Thus in

⁸ See for example *In re County Marine Insurance Company*, 6 Ch. App. 104 (1870).

⁹ See F. W. Pixley's *Auditors: their Duties and Responsibilities*, first edition 1891, and Dicksee's *Auditing*, first edition 1892, for a description of accounting practice. It should be noted that in these respects accounting has not changed.

¹⁰ *Op. cit.*, p. 120.

¹¹ See, for example, Editorial in the *Accountant*, 1887, p. 474.

*In re Mercantile Trading Company (Stringer's case)*¹² the decision hinged upon whether it was proper for a company to have paid dividends on the faith that a debt incurred by the Confederate Government during the American Civil War was valuable. Events proved that the debt was worthless; but the Court held that any estimate made in good faith was in order, and pointed out that almost every balance sheet contained estimates.

For these reasons, the creditors' safeguard that the paid-up capital was represented by equivalent assets, may in certain cases have been insubstantial. Moreover, the "capital maintenance" rule was never thoroughly tested in any of its possible points of weakness. There was no clear-cut case before the Courts where a dividend was paid out of the excess of current receipts and current payments, despite a decline in the value of the company's assets.¹³ The matter was brought to a head in the case of *Lee v. Neuchatel Asphalte Co.*¹⁴ which marked the end of the early doctrine and paved the way for the development of a fresh approach.

In this case the plaintiff's counsel contended that, in declaring a dividend, the company could not ignore the decline in the value of its principal asset, even though the articles of association apparently permitted it. In the Lower Court, Stirling, J., accepted the evidence for the defendant company that the value of the asset had in fact increased. He merely re-affirmed the earlier series of decisions, and did not dispute the contentions of the plaintiff's counsel. It was in the Court of Appeal that Lindley, L.J., sowed the seeds of the new doctrine, after Cotton, L.J., had delivered a somewhat confused judgment. It is important to note that the Court of Appeal's pronouncements were made on the hypothesis of a decline in the value of the asset.

Lindley based his views on the indisputable fact that the Companies Acts contain no direct reference to the payment of dividends. "There is nothing at all in the Acts about how dividends are to be paid, nor how profits are to be reckoned." Again, "The Companies Acts do not require the capital to be made up if lost." "If it is said that such a course involves payment of dividends out of capital, the answer is that the Act nowhere forbids such a payment as is here supposed." Whereas the judges previously had construed the Legislature's silence to mean that its intention was clear from the Acts as a whole, and that therefore a specific ruling was unnecessary, Lindley interpreted

¹² 4 Ch. App. 475 (1869).

¹³ *Davison v. Gillies* (1880), 16 Ch.D. 347n, is a case in point, but it was decided according to the special articles, and not according to the general law.

¹⁴ (1889), 41 Ch.D. 1.

its silence as a conscious desire on its part not to impose its opinion concerning a technical business problem on company managements. Regarding the calculation of profits he said: "All that is left, and very judiciously and properly left, to the commercial world. It is not a subject for an Act of Parliament to say how accounts are to be kept; what is to be put into a capital account, what into an income account, is left to men of business." Business men were to be the judges on business matters. In the particular case before the Court, business men, the directors, had thought it fit to pay the dividend, and as there was no suggestion of bad faith, it was not for the Court to interfere.

In addition to the desire to leave technical business matters to business men, Lindley wished to avoid any ruling which could fetter the "legitimate" activities of companies. The appellant's argument that capital should be maintained at all costs was dismissed because, if adopted, it would "in my judgment, paralyze the trade of the country." He also stated: "It appears to me that the proposition that it is *ultra vires* to pay dividends out of capital is very apt to mislead, and must not be understood in such a way as to prohibit honest trading." If the validity of the proposition were granted "you find yourself landed in consequences which the common sense of mankind would shrink from accepting."

The Appeal judges did not formulate any new theory of dividends; but by their approval of the practice of ignoring declines in the value of a company's property they destroyed the existing "capital maintenance" theory of the dividend fund in one fell stroke. By condoning this accounting practice, by dismissing the previous interpretation of the Companies Acts, and by leaving accounting matters to business men, the stage was set for the promulgation of new criteria for judging the legality of dividend payments.

One may expect that accountants would have welcomed the decision, leaving business matters to business men; because accountants, as a profession, represent a very responsible section of business opinion, especially on matters of accounts. But the decision met with a storm of disapproval from accountants, despite the opinion of the law journals that the decision was in accordance with the "principles of business."¹⁵ An editorial in *The Accountant* declared that "the principles it lays down are simply startling and as they are directly applicable to all colliery and other mining concerns, the danger to be apprehended from

¹⁵ See *Law Quarterly Review*, Vol. V (1889), p. 221, and *Law Journal*, 1889, p. 353.

their general adoption is neither fanciful nor small."¹⁶ The same journal later denounced the judgment as "the most mischievous which has ever been given in relation to company matters," and as being "entirely against the almost universal practice of accountants."¹⁷ In his efforts to free business men from the "strait-waistcoat of a legal formula,"¹⁸ Lindley had sanctioned practices frowned upon by specialists in company accounting.

However, the decision was not entirely as straightforward as contemporary opinion had interpreted it. In the *Lee* case the asset in question was of a particular kind—a so-called wasting asset. Also, there was no evidence that the wasting asset had decreased in value, though the Appeal judges argued on the assumption of a loss in value. Some of the doubts were removed by the 1892 case of *Bolton v. Natal Land and Colonization Co.*¹⁹ where the decline in the value of the asset, land, was held to be irrelevant for the calculation of the dividend fund. But as land itself is an asset in a class of its own, the law was not yet clear.

The case of *Verner v. General and Commercial Investment Trust*²⁰ established the new doctrine more firmly than ever. Here the company, an investment trust, in one year had receipts in excess of its current payments. But this "profit" was completely overshadowed by a slump in the value of the company's assets, the securities in its portfolio. The payment of a dividend in such circumstances was contested.

In the lower Court, Stirling, J., pointed out the radical alteration in the law occasioned by the *Lee* decision. He correctly showed that his decision in the particular case would depend upon whether the earlier doctrine or the *Lee* doctrine were operative. Being bound by the decision of the Court of Appeal, he had to sanction the dividend payment, though he made the proviso that his decision may have been different had the company been "an ordinary trading company."

In the Court of Appeal, Lindley, L.J., approved of Stirling's decision. He shunned any "hard and fast rule which would prevent a flourishing company, either not in debt or well able to pay its debts, from paying dividends so long as its capital sunk in creating the business was not represented by assets, which would, if sold, reproduce in money the capital sunk." He reiterated the arguments of his judgment in the *Lee* case, and

¹⁶ *Accountant*, 1889, p. 89.

¹⁷ *Accountant*, 1889, "Weekly Notes," p. 149.

¹⁸ *Law Quarterly Review*, Vol. V, p. 221.

¹⁹ (1892), 2 Ch. 124.

²⁰ (1894), 2 Ch. 239.

made a statement of the new rule (which we shall call the *Lee* rule), which was to become the classic and always-quoted pronouncement of the doctrine: "Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law." The rule envisaged the division of assets into two classes: fixed assets, which are permanently retained by the company and not intended for re-sale; and floating or circulating assets, which the company does not intend retaining for any length of time, but which have a short life-cycle of acquisition, disposal (or conversion and disposal), and replacement. Declines in the value of the former, as well as expenditure on their acquisition need not be deducted from current receipts when calculating the dividend fund. But any devaluation of the latter, or any expenditure made on their purchase have to be treated as diminishing items.

The *Accountant's* comment on the judgment was that the Court's rulings "are indeed fearful and wonderful; but there is—and has often been—a wide distinction between the authorized interpretation of statutes and the principles of sound accounting."²¹

The bottom had been knocked out of the creditors' safeguard contained in the earlier version of the law. It was sufficient if the creditors' claims could be met; there was no need to have assets equal to the amount of the nominal paid-up capital. As regards creditor protection the new rule created an anomalous position. An investment company which was in a poor way as a result of serious security value depreciation, but which nevertheless had received large dividends from a few of its investments, could further jeopardize the creditors' position by paying a dividend; while a sound investment company which had suffered little or no capital depreciation, but which had not received sufficient dividends to cover its working expenses as well as a dividend distribution, was prevented from paying its shareholders a penny.

Any doubt as to the scope and meaning of the *Lee* rule was dispelled by *In re Kingston Cotton Mills Co., No. 2*.²² Here Vaughan Williams, J., held that, in accordance with the Court of

²¹ *Accountant*, 1894, p. 176.

²² (1896), 1 Ch. 331.

Appeal decisions, the depreciation in the value of the fixed capital (mill property) could be ignored in the declaration of a dividend.

In 1899 a new problem appeared before the Courts:²³ in calculating the dividend fund for any particular period, is it necessary to subtract the losses of previous periods? The preceding cases had laid down that losses of fixed capital could be ignored altogether, unless the particular articles of association stipulated otherwise. But suppose the loss in a previous period represented a deficiency of that period's receipts as against the expenditure on circulating capital?

In *In re National Bank of Wales, Ltd.*²⁴ the facts appertaining to the disputed dividend payments were that dividends had been paid out of the current net receipts while losses on account of bank advances made to impecunious clients in previous years were ignored. The reasoning behind Wright's, J., judgment is obscure, but apparently the view was taken that the losses were losses of circulating capital which had to be made good before dividend payments could be resumed. The Court of Appeal where Lindley, then Master of the Rolls, read the judgment of the Court, reversed the decision. The Court was unwilling to countenance any ruling likely to fetter "men of business." "It may be safely said that what losses can be properly charged to capital, and what to income, is a matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ." "There is no hard and fast legal rule." It seems as if the Court wished in this way to escape from the consequences of its previous rulings that losses of circulating capital had to be taken into account.

This decision which, in effect, permitted the results of any period's trading to be considered in isolation without reference to the company's previous fortunes, did not find favour among all accountants. One of the foremost members of the profession, Sidney Dawson, wrote: "The leading cases . . . since 1899 . . . suggest that questions which presumably were very properly and judiciously left to the commercial world and shareholders to settle—questions which were being settled and the results codified by a consensus of opinion—have been reduced to a financial 'go-as-you-please'—with an undecipherable minimum of principle—by the quinquennial decisions of the Court of Appeal."²⁵ Apparently the only restriction, if it may be considered as such, on the payment of dividends was that the receipts in any period

²³ But see footnote 47 below.

²⁴ (1899), 2 Ch. 629.

²⁵ *Accountant*, 1899, p. 892.

had to exceed the expenditure during that period on circulating capital.

The *National Bank case* was taken to the House of Lords.²⁶ As all the parties concerned acquitted the respondent of all "moral obliquity," the discussions on dividend questions were regarded as irrelevant for the decision. The sole reason why the problem of dividends received any consideration at all, was that the Lord Chancellor wished to dissociate himself from some of the earlier judicial pronouncements on the subject. He doubted "whether such questions can ever be treated in the abstract at all," and he foresaw that in any particular case "many matters will have to be considered by men of business, which are not altogether familiar to a Court of Law." He was impressed by the fact that rigid rules may prove to be a great inconvenience to companies. "People put their money into a trading company to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve its ruin." Lord Macnaghten was even more emphatic in his denunciation of definite rules: "I do not think it is desirable for any tribunal to do what Parliament has abstained from doing, i.e. to formulate rules for the guidance and embarrassment of business men in the conduct of business affairs."

It is not easy to appraise the net effect of the dividend discussion (one cannot call it a decision) in the House of Lords. It is not clear whether it was intended as a repudiation of Lindley's "fixed capital, circulating capital" formula; or whether it was no more than a deprecation of that formula on the grounds that any rule, even if as innocuous as that one, was undesirable. The discussion is still further confused by Lord Davey's contribution. Accepting, in the main, the *Lee* rule, he disagreed with the decision of the Court of Appeal because in it "the learned judge appears to me to have departed" from his (Lindley's) earlier statement of the law. However, though it did little to clarify the main problems, the House of Lords' deliberations confirmed the dominant trend in the decisions since the *Lee case*. The principle, which was first enunciated in that case, that business matters are the province of business men, was re-affirmed in the strongest terms by the highest tribunal. In the future the well-worn phrase that "capital must be kept up" could be countered by citing not only the Court of Appeal decisions, but also the statements of the noble Lords.

Accountants, business men and lawyers, who probably expected a more positive statement from the House of Lords, must have

²⁶ Reported as *Dovey v. Cory*, 1901, A.C. 477.

been disappointed at the meagreness of the "decision." Nevertheless, some of the fears of accountants were allayed. The *Accountant* wrote: "Still, the ground has been greatly cleared by the removal of what all our readers must have felt to be an entirely incorrect general statement with regard to the matter, and it is now apparent that any case that may hereafter come before the Courts will be decided on exactly the same lines as those which ordinary business men would adopt in dealing with the same question."²⁷ Apparently it was believed that the *Lee* rule, which to them was unpalatable, was to be superseded by an arrangement where responsible business opinion, presumably accounting opinion, would be called in, in every case, as arbiter.

*Bond v. Barrow Haematite Steel Co.*²⁸ was the first case to be decided after the House of Lords' discussions. In this case a dividend payment was urged by a preference shareholder on the ground that the losses arising out of the flooding of mines and miners' cottages could be ignored in the calculation of the dividend fund. The defence was that these losses had to be taken into account.

Following the lines suggested by *Dovey v. Cory*, Farwell, J., correctly stated that "the real question for determination, therefore, is whether there are profits available for distribution, and this is to be answered according to the circumstances of each particular case, the nature of the company, and the evidence of competent witnesses." The defendant Company called witnesses, including the eminent accountant, Pixley, who expressed the opinion that the losses could not be ignored, but had to be deducted from the company's earnings. On the evidence, it is clear, that the judge's decision that there were no divisible funds, was in accordance with the view favoured by the Lords, and approved by the *Accountant* in the previous year.

However, Farwell was apparently not wholly satisfied with this argument, and in his judgment he declared that his opinion coincided with that of the experts "inasmuch as I think that the money invested in these items (mines, etc.) is properly regarded in this company as circulating capital." He therefore came to the same conclusion whether he followed the House of Lords, or whether he followed the Court of Appeal's *Lee* rule. His judgment has been criticised by many authorities, including the contemporary *Accountant*²⁹ on the ground that the losses were losses of fixed capital, and not of circulating capital. Leaving

²⁷ *Accountant*, 1901, p. 876.

²⁸ (1902), 1 Ch. 239.

²⁹ See *Accountant*, 1902, p. 153; Scrutton, L.J., in *Chamberlain v. Ammonia Soda Co.* (1918), 1 Ch. 266; Halsbury: *Laws of England*, second edition, 1932, p. 392n.

aside the interesting problem in definition raised by the facts of the case, it is plain that the learned judge, as well as accounting opinion, was still thinking in terms of the *Lee* rule, and that the evidence of competent business and accounting witnesses was not necessarily the deciding factor. The House of Lords' warning not to treat the question in the abstract had been forgotten. Moreover, the *Accountant's* denunciation of the decision because "the requirement that 'circulating capital must be kept up' would be impracticable if extended so as to require every mining company to show value for all the money that it had ever spent upon acquiring and developing its property" suggests that the line of decisions since 1889 did not perhaps diverge so greatly from the practices of responsible accountants as some of their criticisms may lead one to believe.

The most recent case where important aspects of the law have been discussed is *Ammonia Soda Company v. Chamberlain*.³⁰ In the first years of its existence the company had suffered trading losses, but eventually its operations showed successful results. The early losses had been offset in the accounts by writing-up the value of the company's property, as ascertained by a valuation which, it was held, was made in good faith. Dividends were paid and disputed. The case turned upon whether it was proper to include the unrealized increase in the value of the property in the computation of the divisible profits. If this were held to be improper, the dividend distribution would nevertheless be in order if it were held that it was unnecessary to deduct prior losses from current trading profits.

On the first point, an eminent accountant, Sir Woodburn Kirby, gave evidence that "it was contrary to all principles of commercial accountancy to write up the value of a fixed asset and apply the surplus so obtained to meet a deficit on trading." Peterson, J., refused to accept this view. "If an agricultural company has land under which valuable coal reserves are discovered, it is difficult to see why it should not be allowed to show in its balance sheet the increased value of its lands." He also indicated the peculiar consequence of accepting the accounting point of view. The company could not pay dividends. But neither could it have a capital reduction scheme sanctioned, because its nominal capital was in fact represented by equivalent assets. Once again a matter which, according to the House of Lords, should have been left to business men, was settled by the Court in opposition to the views of some acknowledged experts who gave evidence.

³⁰ (1918), 1 Ch. 266.

On the second point, the learned judge stated that: "Where a company has made losses in past years and then makes a profit out of which it pays a dividend . . . such a dividend is not paid out of paid-up capital. If it were, the paid-up capital would be still further reduced by the payment. In fact the assets representing the paid-up capital remain the same or of the same value as before the payment of the dividend."³¹ This ingenious argument, which places the results of each period's trading into watertight compartments, virtually means that any item of loss is irrelevant to the size of the dividend fund except in the period in which it is incurred. The corresponding rule that profits may not be carried forward from one period to another could be supported by an argument analogous to that of Peterson, J.; but it would scarcely be to the taste of men of business or accountants.

The Court of Appeal was in full agreement with the ruling of the lower court, approving and extending the earlier decisions. In addition, Scrutton, L.J., reverted to the *Lee* rule in unambiguous terms. He respectfully brushed aside the objections of the Lords against that rule by saying that "one requires a much clearer expression from the House of Lords" "before one can treat a decision of the Court of Appeal as over-ruled."

Even accounting opinion had at last approved of a legal decision, partly because of its undoubted lucidity (as compared with its predecessors) and partly because it "is likely to be convenient in practice." "It would often be a very great convenience if directors felt fully justified in declaring dividends out of profits earned as soon as a company has really 'turned the corner,' and begun to make profits, instead of feeling compelled in the first instance to apply all profits made towards the making up of past losses."³² It is interesting to compare this comment with that which was provoked by a similar decision in 1899.³³

2. The Present State of the Law

Commentators on the law of dividends are unwilling to hazard any generalisations about the present state of the law. The above survey of the leading cases indicates why this reticence is necessary. Nevertheless, it is possible to state some general conclusions. In the first place, the doctrine of the earlier period before 1889 which, in substance, stated that no dividend payment

³¹ "Before the payment of the dividend" presumably means at the beginning of the period in which the trading "profits" were earned.

³² *Accountant*, Vol. 57, p. 418.

³³ *Supra*, p. 11.

could be made unless the remaining assets (valued according to accepted conventions) were at least equal to the nominal capital, is no longer operative.³⁴ It has been replaced by rules and principles giving to company directors the maximum of freedom in the declaration and payment of dividends. The emphasis has swung from creditor-protection to non-interference. A partial explanation of this radical change may be that with the development of other aspects of the company law, the necessity of protecting creditors by restricting the payment of dividends became less urgent. The "liberal" trend in mercantile law, finding expression in the acceptance by the Courts of the business man's view of what the law ought to be,³⁵ may be another reason for the relaxation of dividend restrictions.

The curious position has been reached that, though the Courts do not wish to formulate any rules, but more particularly restrictive rules, for the "guidance and embarrassment" of business men, yet they have in fact enunciated abstract, though widely permissive, rules. These rules have, at times, been resented by responsible sections of business opinion precisely because they have been regarded as too liberal. The business man's wish, that he should say what the law ought to be, has, in theory, been granted since 1889 and sanctioned by the House of Lords, but has seldom been strictly applied to any important dividend case. The explanation is not far to seek. There is no real unanimity of business and accounting opinion on matters of dividend payments and accounting. And as every dividend payment is sanctioned by the company's board of directors, which, by hypothesis, consists of men of business, obviously every dividend, unless its payment is prompted by some dishonest motive, can be regarded as proper from a business point of view.³⁶ Other business men may disagree with the propriety of the payment; but it has not been possible to range the opinions of business men in order of expertness. In *Ammonia Soda Company v. Chamberlain* this difficulty is patent. Eminent accountant witnesses condemned a certain practice. But as Peterson, J., noted: "Most if not all of the shareholders who attended that meeting were commercial men and they unanimously approved of the proposal"; and

³⁴ The early principle is still invoked in certain circumstances. Where there are no profits (in the business man's sense), no dividend will be held to be valid, owing to the obvious encroachment on the paid-up capital. In *In re Walters' Deed of Guarantee* (1933), 1 Ch. 321, the principles in *Trevor v. Whitworth* were quoted as preventing any payment to a shareholder, even where guaranteed, where there are no "profits."

³⁵ See R. S. T. Chorley: "Liberal Trends in Present-day Commercial Law," in *Modern Law Review*, Vol. III, p. 272 (1940).

³⁶ See the comment on the *Bond* case in *Juridical Review*, Vol. XIV: "The director's discretion is evidently to be the ultimate court of appeal."

“admittedly experienced Chartered Accountants certified the balance sheet . . . without suggesting any doubts as to the correctness of the course which had been pursued.” Faced with similar conflicts of opinion, the Courts have had to decide for themselves in some way. They have not unnaturally preferred to adhere to the rules and decisions of the Court of Appeal made before the House of Lords passed its strictures upon the use of abstract rules and arguments; because, if the Lords’ warning had been followed strictly, the Courts in many cases would have had to choose between the diametrically opposed opinions of individuals equally qualified to be called “men of business.”

The wide degree of latitude permitted by the Courts is contained in the rules that (i) fixed capital, if lost, need not be “made up” or “replaced”; (ii) prior losses, even if of circulating capital, need not be “replaced”; and (iii) unrealised increases in the value of fixed assets may, in some cases, be included in the calculation of the dividend fund. Moreover, there is the general principle that business men must decide what goes into the capital account and what into the income account. Whether these permissive rules are operative in any particular case will depend upon the company’s articles of association, which may lay down more stringent requirements.

There is much uncertainty both as to the scope of these rules, and their practical application. The latter arises partly because some of the rules are based upon distinctions which are not clear-cut and have no real logical basis. For instance, what is fixed capital and what is circulating capital? Commonly the distinction is said to depend upon the motives which prompt their acquisition. In practice the distinction is made to turn upon the length of time the asset is normally held in the possession of the company *or* upon whether the asset is a raw material (or item of stock-in-trade) or a piece of equipment. The borderline cases prove the arbitrariness of the distinction. Thus the mining property of a *smelting* company is a circulating asset if regarded as a source of raw material. It is a fixed asset if the “length of time” criterion is applied. This confusion explains why in the *Bond* case the judge held the mine to be a circulating asset, and eighteen years later another judge considered it to be a fixed asset; while one accountant supported the former judge, and the leading accounting journal criticised his decision.

More important is the fact that some of the guiding principles are contradictory in their practical application. According to the rule that fixed capital may be sunk and lost, the normal depreciation of plant and machinery may be ignored. This view apparently

influenced the decision in the *Kingston Cotton Mills case*.³⁷ On the other hand the majority of responsible business men and all accountants would certainly insist that normal (wear and tear) depreciation must be deducted when calculating divisible profits.³⁸ One therefore cannot give a definite answer to the question whether the law requires a deduction for the depreciation of plant and machinery. The tenor of the legal decisions, as opposed to the implications of some of the dicta, would suggest that depreciation may be ignored. Indeed, this was the view of one of the leading accounting writers, the late Lawrence Dicksee: "It would appear doubtful as to whether the law compels *any* company to make provision for Depreciation, before declaring dividends out of its earnings."³⁹

In practice in the majority of cases the calculation of the dividend fund is made according to the rules of accounting. The uncertainty of the law has been responsible for this in part. But the main reason is that the calculation is part and parcel of the accounting system, and becomes embodied in the profit and loss account and balance sheet which have to be certified by accountants. The rules of accounting are less generous than the permissive rules of the legal decisions. Very few accountants would readily agree to the neglect of provisions for depreciation and few would utilise the unrealised accretion in the value of assets to offset losses. But the accounting rules themselves are neither clear-cut nor definite nor easy of application. The logically untenable distinction between fixed and circulating capital forms the basis of accounting practice, just as it is the foundation of some of the legal rules. Also, there are no definite criteria determining how much should be charged as depreciation; or how much should be set aside as contingency reserves; or how the so-called intangible assets, for example preliminary expenses, should be treated. Over-riding all these uncertainties is the fact that the more or less general adoption of the secret reserve technique vitiates any attempt at a greater degree of precision in the measurement of what accountants regard as the dividend fund. Even though accountants may have definite views on the size of the fund in any particular case, the legitimate use of secret reserves means that when the accounts are published the magnitude may appear to be vastly different from what may have been considered to be that of the real fund.

³⁷ *Supra*, p. 10.

³⁸ The business man's view of depreciation has been accepted in some cases, none of which dealt with the payment of dividends: *Glasier v. Rolls*, 42 Ch. 436 (1889); *Re Crabtree*; *Thomas v. Crabtree*, 106 L.T. 49 (1912).

³⁹ *Auditing*, 14th edition, 1928, p. 271.

3. Some Consequences of the Law

Some aspects of the consequences of the present uncertain state of the law will now be sketched. It will be necessary in some cases to separate the effects of the legal rules from those of the accounting rules employed in practice; though in many cases they may coincide.

The Companies Acts of 1867 and 1877 were designed to enable a company to write off losses of capital, which precluded the payment of dividends under the earlier capital maintenance rules, and resume dividend payments on the reduced capital. Apparently the dangers to creditors and others were realised and adequate safeguards were provided. The sanction of the Courts was necessary. The present dividend law renders nugatory the special provisions of the statutes. Dividends may be paid even where some portion of the capital is lost. The practical effect of the *Lee case* is illustrated by a report from Lee, the plaintiff in that case. He tells how two companies which were in the process of making use of the special legal machinery to reduce their capitals, promptly abandoned their capital reduction schemes when the Court of Appeal's decision was published.⁴⁰ To-day in many cases the special provisions of the statute are resorted to only to enable a company to hold itself out as being more prosperous than it really is. By reducing the nominal capital, the same dividend represents a greater percentage of the capital than otherwise; and the unsophisticated shareholder may be hoodwinked.

The law has left company managements with freedom to do almost exactly what they choose. As the maintenance of an harmonious relationship between shareholders and management depends so largely on the regular payment of dividends, the law's concession is of great value. The sole danger to management lies in the vagueness of the law. This, and the severe penalties which may follow the Court's veto of a dividend payment, may deter the management from declaring a dividend in borderline cases. According to Professor Bonbright in the United States, where the law is as uncertain as in England, "few topics are so frequently a matter for consultation between corporations and their counsel. Rarely are the attorneys able to give a definite opinion."⁴¹

The rejection of the capital maintenance concept of dividends has meant a substantial reduction in the creditors' safeguards. The old safeguard of capital maintenance may have been necessary when company law was in its rudimentary stages. It was probably to some extent based on the view that one could

⁴⁰ Letter in the *Accountant*, 1889, p. 178.

⁴¹ Bonbright: *The Valuation of Property*, Vol. II, p. 972.

not judge the wealth of an impersonal corporation, and that therefore it was necessary to ensure that every company had a certain irreducible minimum of resources (unless lost), upon which creditors could advance their credit. To-day with the compulsory publication of accounts and the public registration of a company's debenture and other obligations, it is not unlikely that a creditor knows more about a company's credit standing than that of a private trader. To-day the creditor, on the whole, has little cause for complaint. The legal decisions since 1889 specifically require that in doubtful cases where creditors' interests are involved, the dividend payment should not leave the company with insufficient funds to meet its obligations. The creditor is further protected by the fact that a payment, which, to the knowledge of the management, would precipitate the company's insolvency, is illegal, and the responsible directors are subject to severe penalties.

The informed shareholder could advance a number of criticisms against the present dividend law. In the first place, the law's (uncertain) definition of the dividend fund is probably materially different from the ordinary layman's conception of that fund. The shareholder almost certainly imagines that dividends are paid only out of "profits." Indeed, the learned judges in their decisions repeatedly state that every dividend presupposes a "profit." The particular company's articles of association probably follow the Companies Acts' Table A in declaring that, "No dividend shall be paid otherwise than out of profits." The company's annual accounts will stress a figure called "Profit for the year." Everyone appears to be agreed that dividends are paid out of "profits." But there is no agreement as to the meaning of that term. The layman very likely regards "profits" as an accretion to the original investment, so that its removal would leave a balance of assets equal in value to the original amount of the investment. In other words, "profits" imply that capital has been maintained intact. And as has been shown, neither the law nor the rules of accounting requires capital to be maintained intact before a profit is said to arise. In so far as dividends may be paid other than out of "profits" (in the layman's sense), some dividends payments may be tantamount to acts of misrepresentation. It is unfortunate that the Courts and accountants have made use of terms such as "capital" and "profits," which have acquired specialised meanings in their special contexts.⁴²

⁴² In an interesting judgment in *In re Spanish Prospecting Co., Ltd.* (1911), 1 Ch. 93, Fletcher Moulton, L.J., stressed the fact that "the strict meaning of the word 'profits' is rarely observed in drawing up the accounts of firms and companies."

The confusion of dividends with "profits" may, of course, lead the shareholders to erroneous conclusions about the prosperity and success of their company and the ability of its directorate. It may also lead to serious miscalculations on the part of a shareholder's spending habits. Regarding dividends as a surplus over and above the invested capital, he may treat it as spendable income. The shareholder may consider the dividend as the recurrent crop of fruit which may safely be consumed without encroaching on the original investment, the tree. In fact, the law allows the fruit to be described in terms suggesting recurrent income, even where it is known that the tree is steadily withering away; so that ultimately there may be neither fruit nor tree. When that sad state of affairs occurs, the shareholder will learn, too late, that the law's "profits" are not necessarily his "profits."

The fact that the law is vague and that the practical calculation of the dividend fund is made according to the narrower accounting rules, means that the shareholder never knows the maximum amount which may be withdrawn from the company as dividends. The use of the secret reserve technique, which allows the amount of the fund, as published, to be varied within wide limits, aggravates the situation. The shareholder never knows how much is being automatically reinvested by the decision not to pay higher dividends. He cannot, therefore, judge the wisdom or otherwise of the directors' dividend policy. While it would be incorrect to assume that the customary conservative dividend policy is always unwise,⁴³ it would be equally incorrect to assume that reinvestment policies are always designed to maximise the income, present and future, of the shareholders. The directors or management may be more interested in the long life and constant expansion of the company⁴⁴ than in obtaining the highest returns for the investors. Moreover, even where the ploughing back of earnings is the most profitable investment available, the majority of the shareholders may not want to save the proceeds of their original outlay at all, but to spend it. Indeed, many

⁴³ See, for instance, Coase, Edwards, and Fowler: *The Iron and Steel Industry, 1926-1935*, London and Cambridge Economic Service Special Memorandum, No. 49, p. 18.

Reinvestment in the company has always the great advantage that the cost of selecting and making the investment is avoided. The risk is usually smaller, too, because the directors know more about the prospects of their own company than they, or the average shareholder, can ever hope to know about those of most other investment opportunities.

⁴⁴ The reason for this desire need not be stated in the case of an English company which has an important department exclusively devoted to the acquisition of new ventures.

company managements have found that the manipulation of secret reserves is an effective weapon to baulk the shareholders clamouring for higher dividends. By the simple expedient of not showing the full size of the dividend fund, the shareholders are ignorant of the implications of the management's reinvestment policy. When one considers the detailed publicity which the law demands when a company raises its capital from the public, it is strange that the equally real investment by the process of withholding dividends is often allowed to occur without the investors even being informed of the amount of the reinvested resources.

A further source of criticism would be that the law of dividends provides no basis for the adjudication of the conflicting interests of different classes of shareholders in the total dividend fund of a company. There may be several classes of preference shares, as well as ordinary and deferred shares. Each class has a different stake in the total fund, and in the proceeds which will arise on the dissolution of the company; and their interests are usually ranged in some order of priority. It follows that every payment of dividend to any class of shareholders leaves less available for the others, and reduces the balance which would be divisible in the event of a dissolution. To avoid possible friction or the exploitation of one class of shareholders by another class, or by the management, it is desirable that there should be some rules to determine the equity of dividend payments in cases where there are several classes of shares.

No such rules can be found in the legal decisions. Occasionally the notion of fair-play towards one or other of the classes of shareholders is encountered in the dividend cases. The most important one is *Dent v. London Tramways Company*,⁴⁵ which was decided in 1880, before the *Lee* rule was propounded. It is necessary to go back to the earlier case of *Davison v. Gillies*,⁴⁶ concerning the same company. Here the payment of an ordinary dividend was restrained because depreciation had been ignored and the articles of the company were held to imply that depreciation reserves had to be created. In *Dent's case* the payment of a *preference* dividend was urged on the grounds that, according to the articles, preference dividends were "dependent upon the profits of the particular year only." There was expert evidence of the existence of profits for that year, in the sense that the value of the assets at the end of the year was higher than at the beginning of

⁴⁵ (1880), 16 Ch.D. 344.

⁴⁶ (1880), 16 Ch.D. 347n.

the year, though still below the nominal capital of the company. The plaintiff's claim was upheld by Jessel, M.R., partly because of the special proviso of the articles, but largely because to have decided otherwise would have caused a fairly obvious injustice. He stated: "The argument for the company amounts to this, that inasmuch as they have improperly paid to their ordinary shareholders very large sums of money which did not belong to them, they, the company, are entitled to make good that deficiency by taking away the fund available for the preference shareholders to an amount required to put the tramway in proper order. When the argument is stated in that way, it is clear that it cannot be sustained."⁴⁷

The *Lee case* may be taken as another example. Here Lindley, L.J., advanced as one of his subsidiary reasons for rejecting counsel for the appellant's claim that capital should be kept up, the fact that "putting it into plain language, he (counsel) is asking us, at the instance of the ordinary shareholders, to break faith with the preference shareholders."

The difficulties involved in the settlement of the conflicting interests of different classes of shareholders are clearly brought out in *Verner v. General and Commercial Investment Trust*.⁴⁸ Counsel for the appellant urged that "the rights of preference shareholders must be considered as well as those of creditors." He argued that if dividends were paid despite a loss of capital, there might be insufficient assets left in the case of dissolution, and the prior claim of the preference shareholders in the winding-up assets would be of little value. Stirling, J., however, pointed out that if no preference dividends were paid unless capital was kept up, the effect "would be to preserve the capital of the company really for the ultimate benefit of the deferred (ordinary) shareholders"; the argument being that on dissolution, if the capital had been maintained, the ordinary shareholders would be repaid their original contributions after the preference shareholders' claims had been met. Now both these arguments may be sound. Either course may be more beneficial for the preference shareholders, depending largely upon how much in every year would be available for the ordinary shareholders as dividends,

⁴⁷ Mr. J. L. Weiner in his "Theory of Anglo-American Dividend Law," *Columbia Law Review*, 1928, p. 1052, is of the opinion that *Dent's case* decided the question, "May a company declare dividends out of the profits of the particular year despite past losses?" in the affirmative. But it seems to be more reasonable to regard it as having decided the question, whether past errors in favour of the ordinary shareholders may be allowed to prejudice the interests of the preference shareholders, in the negative. The preceding case of *Davison v. Gillies*, decided by the same judge, refutes Mr. Weiner's contention.

⁴⁸ (1894), 2 Ch. 239. For the relevant facts, see above, p. 279.

and upon the extent of the capital loss.⁴⁹ The question of dividend distributions bristles with such problems; and there is no indication that the question has ever been fully considered by the Courts.

The inequitable working of one of the dividend rules is illustrated in *Lawrence v. West Somerset Mineral Railway Company*.⁵⁰ Here the conflict was between the interests of bondholders and shareholders; but the position would have been unchanged if there had been preference shareholders instead of the bondholders. The company leased its property to another concern for a rental which enabled it to pay the bond interest as well as ordinary dividends. The lease ran till 1919, but long before that traffic had been discontinued; and the value of the property had fallen appreciably. The rental had nevertheless been received annually. In 1918 the bondholders attempted to restrain the payment of the ordinary dividend because its payment and the imminent cessation of the lease meant that there would have been grossly insufficient assets to repay the debenture loan in the likely event of dissolution. The Court refused to interfere because the dividend would not have been paid out of capital, in the legal sense. The bondholders' supposedly greater security in the shape of a prior claim to the capital on dissolution, proved to be wholly illusory. This form of security, which is often given to preference shareholders, is always very precarious if losses of capital may be ignored in the payment of dividend.

The lack of any legal principle of arbitration between shareholders' income interests is rendered more chaotic by some aspects of company practice and accounting methods. In many cases

⁴⁹ An example may clarify the argument. One investment company with a nominal capital of £100 has 50 6 per cent preference shares of £1 each and £50 in ordinary shares. The preference shares rank before the ordinary shares in the event of a winding-up. The Company exists for two years. Its investments depreciate by £50, and on dissolution realise that amount. The current net receipts (i.e. gross receipts less working expenses) are £3 in each year.

(i) If dividend payments are not permissible where capital is lost, then the net receipts will accumulate within the company, and on dissolution the assets will realise £56, of which the preference shareholders receive £50, and the others £6.

(ii) If dividend payments are legal, the preference shareholders would receive two annual dividends of £3, and their capital, £50, would be repaid on dissolution. The ordinary shareholders will receive nothing. Clearly a permissive rule is more advantageous to the preference shareholders.

Assume that another company has the same capital structure. Its assets depreciate to £40. The current net receipts in each year are £5.

(i) If the dividend payments are not permissible, winding-up assets would yield £50, all going to the preference shareholders.

(ii) If the payments are legal, and dividends are paid up to the hilt, then in each year the preference shareholders receive £3, and the ordinary £2. The £40 on dissolution goes to the preference shareholders, who in total receive £46 out of the £50. Clearly a restrictive rule in these circumstances favours the preference shareholders.

⁵⁰ (1918) 2 Ch. 250.

preference dividends are not payable unless recommended by the directors, even where legal "profits" are available. By not recommending a preference dividend in one year, there is a larger dividend fund available in the next year. And unless the preference shares carry cumulative or, in some cases, participating rights, the preference shareholders will receive only one year's dividend, the balance accruing to the ordinary shareholders. The use in accounting of secret reserves enables earnings to be shifted, in the published accounts, from one year to another. The ordinary shareholders will receive a larger share of the total "profits" if they are artificially concentrated in one year, than if they are spread evenly over a number of years. The possibility of "routing" profits from one class of shareholders to another is infinite.

A final aspect of the law of dividends is its impact upon the economy in general. Historically, it appears that the privilege of limited liability was conceded to partnerships precisely because it was believed that it would lead to benefits to the community as a whole, by facilitating necessary large-scale investment, which otherwise would have been impossible. The free rein given to business men in the matter of dividends may, in part, have been inspired by considerations for the welfare of the economy. The widely accepted thesis, which still has its adherents, that the untrammelled enterprise of the business man is most conducive to the public weal, may have been a strong factor influencing the Courts' attitude of non-interference. Indeed, Lord Lindley expressly disapproved of the capital maintenance rule because, in his view, it would "paralyze the trade of the country."

The law of dividends may be undesirable if it prevents the transfer of capital from a company to any other more profitable investment channel. Restrictive dividend rules may compel a company to retain some or all of its transferable capital resources, even if it were patently advisable to effect a redirection of capital. Of course, no dividend rule could effectively prevent such transfers, because the alternative expedients of winding-up, or capital reduction accompanied by the return of capital, would get round it. But the first possibility may be too drastic, as it may not be desirable to cease the company's activities altogether. The second possibility is more feasible, but the machinery is cumbersome and expensive, thus enhancing the cost of the new investment.

In the case of a *continuing* company the law, ideally, should not interfere with the repayment of the company's total *cash* fund to the shareholders in the form of periodic distributions.

The investors could then re-invest the funds as they thought fit. The cash fund is increased by (a) the funds received on the sale of the company's output, and (b) from the sale of its capital equipment. It is reduced by (c) expenditure on materials and labour producing the output, and (d) on the purchase of its capital equipment. Also, it may be increased by (e) loans raised on the security of the company's assets.

The law at present allows item (a) to be paid away, and insists that item (c) be deducted. It does not seem as if the law requires item (d) to be subtracted. But, considered in isolation, the law's attitude towards either items (c) or (d) is irrelevant; the actual expenditure incurred reduces the cash fund, and it is financially impossible to pay a dividend ignoring these items. As regards item (b), amounts realised on the sale of so-called fixed assets, the law is not clear. Mr. Westby-Nunn, in an interesting paper, has reached the conclusion that only the excess of the sales proceeds over the cost may be divided.⁵¹ This view is in line with the decision in *Lubbock v. British Bank of South America*,⁵² and will be approved by accountants. In this respect the present law is somewhat restrictive.

As regards item (e), while it may be proper to raise a loan to pay dividends where there is a legal dividend fund, but no available cash (because, for instance, the current net receipts have been used to expand the stock-in-trade), it is not permissible to use the proceeds of a loan to pay dividends where no dividend fund exists. In this respect, too, the law is restrictive on the mobility of capital.

In practice, the rules of accounting are more restrictive. The insistence on depreciation and other reserves may prevent the distribution of the whole cash fund. The reserves do not represent the actual expenditure of cash; and their deduction in the calculation of the dividend fund may reduce the divisible balance below the amount of the available cash fund. The tendency towards financial conservatism, and the desire to have on hand funds to meet possible misfortunes or to finance expansion, strengthen the institutional barriers against the perfect mobility of capital.

The practical restrictions are much more important than the legal restrictions. The proceeds of the sale of capital equipment is relatively insignificant; while a company that wishes to pay dividends not out of earnings but on the security of its assets, which are not producing an income, seems in most cases a fit

⁵¹ *The Law Relating to Profits available for Dividends*, 1931.

⁵² (1892), 2 Ch. 198.

subject for the scrap-heap. To combat the practical restrictions it is necessary to alter the dividend *policies* of companies; the law at present seems to offer no serious obstacle to capital transfers. One merit of the *Lee* rule is that it brings the dividend fund into close alignment with the available fund of cash resources.

4. Conclusions

While it may be easy to level criticism at the law as it stands, it is difficult to suggest the remedies for its present defects. The complicating factor is the many interests involved. The general public, the investing public, the company's shareholders and the various classes of them, the creditors, and the management, all have special requirements which they may like to see satisfied by the law. And one requirement can be satisfied only at the expense of others. The complete freedom of a company to dispose of all its liquid resources may be desirable to permit the perfect mobility of corporate capital; but unless there are adequate safeguards the interests of creditors or of some classes of shareholders may be prejudiced. Some of the shareholders' difficulties may be removed if the dividend fund is capable of rigid and certain calculation according to a code such as that contained in the income tax regulations; but such a scheme may interfere with the mobility of capital, besides depriving the company form of organisation of its flexibility regarding dividend distributions, which in some ways is beneficial to shareholders.

Nevertheless, it is possible to suggest general lines along which the law may be improved. Greater clarity is the first essential. In the absence of statutory regulations it is highly desirable that the position of the Courts should be more clearly stated than has been the case in the past. The issues may be simplified if the law would refrain from using terms which have no unanimously accepted meanings; and the complete divorce of the word "dividend" from the notion of "profit" would serve as a useful warning to the unwary.

It is necessary to realise that improvements in the law relating to dividends alone may prove to be ineffectual. The clarification of the law will not, by itself, give the shareholders a greater degree of control over dividend policy. It is as necessary, for example, to restrict the managements' powers of preventing the payment of high dividends by the simple device of not recommending them. The equitable adjustment of the conflicting interests of different classes of shareholders depends as much on the more careful definition of the income rights of each group as on the re-statement of the dividend regulations. Similarly, no

refinement of the law relating to dividends can guarantee the mobility of capital; the dividend policy is the pivotal consideration.

Finally, any improvement must necessarily be based upon a consistent theory concerning the regulation of limited liability companies. The problems of shareholder protection, creditor protection, considerations of public policy, and the desire for a minimum of interference cannot be resolved satisfactorily, unless there is an underlying unifying idea. The relative urgency of the claims of the conflicting parties could then be ranged according to this basic idea. It is suggested that this co-ordinating idea should recognise the fact that the typical shareholder is no longer a business man cognisant of the subtleties of the law and its language, but a passive provider of capital perhaps altogether ignorant of the ways of the law and business men. It is submitted, too, that though a policy of allowing business men to say what the law ought to be may be praiseworthy where the law can only affect experienced commercial men, it is not necessarily suitable where the rights of those outside the business world may be involved.

BASIL S. YAMEY.

TEXTBOOK MYTH ON INTERNATIONAL LAW

In June, 1940, when France capitulated, Norway and the Low Countries had been overrun, Neutrality became a word of terror and awe, and the invocation of a rule of International Law would provoke pity, contempt or despair, the Whewell Professor of International Law completed the new edition of the second volume (Disputes, War and Neutrality) of the leading textbook on International Law, which a predecessor of his had written in happier times. This is certainly an act of courage and faith. No doubt many international lawyers will go further and praise the publication of this new edition amidst the tempests of the present war as a demonstration of the unshakable firmness and superiority of the rule of law in international relations, which the assaults of lawless criminals, even if they comprise a number of powerful states, cannot destroy. Among these, probably, will be the learned author of the observation recently made that the talk about failure of International Law was much to be deprecated, for if there were no International Law, the "Columbus," for example, would have been sunk by British warships inside territorial waters. Professor Lauterpacht introduces his new edition with the following preface—

"The present volume goes to press in June, 1940—at a time of an anxious phase of a war whose outcome is bound to influence decisively the substance and the structure of International Law in the coming generation. In the meantime, the exposition of the existing law must disregard the possibility or the prospects of its changes in the future or the facts of its violations in the past."

In these few words lies the key for the attitude of mind which made the publication of such a book at such a time possible. They contain three major assumptions, each of them presented as a fact, without even the hint of a doubt—

First, that changes in the present international law of war, neutrality and disputes are a matter of future possibilities or prospects.

Second, that violations in the past have been nothing more than violations, leaving the validity of the old law quite unaffected.

Third, that there is an "existing" law.

By taking all these assumptions for granted, the Whewell Professor could proceed to re-edit a book of some 720 pages, which to many must appear as an account of recent history rather than of present law.

The whole structure and substance of the book the distinguished editor has left untouched. Out of about 500 chapters, 28 are either added or largely rewritten. But we should at once make a distinction. The great majority of these chapters concern technical points raised by new developments, or events of the present war such as the Altmark incident, and are based on the assumption that the principles of the law are not affected. Such questions as "recognition of the right of enemy subjects to rebellion," or "defensively armed merchant vessels" or "attacks on enemy civil aircraft," or the Altmark case are questions of detail, highly important as long as the fundamental structure stands, but entirely irrelevant if this is no longer the case. Perhaps only four of the new chapters attempt to gauge developments and changes of more fundamental importance: those on sanctions in the theory and practice of the League; on modern developments in

the distinction between armed forces and civilians; on the relation of the rules of air warfare to those of war on land and sea; and on State control over private activities and the law of neutrality. Each of these might have led to a questioning of the whole edifice, but in every case Professor Lauterpacht, having gone some way towards admitting the tremendous impact of these different developments upon the whole basis of international law, in particular that discussed in the present volume, shrinks from the logic of his own observations and saves the situation, on paper, by a compromise. Thus the editor states succinctly, in Sec. 57*a*, five principal reasons for the grave threat to the distinction between armed forces and civilians, namely the growth of the number of combatants, the growth of the numbers of non-combatants engaged in war preparations, the development of aerial warfare, the primary importance of economic warfare, and the advent of totalitarian states. Each of these factors forms part of a far more comprehensive development, the transformation of international society in a manner which makes legal rules framed for a different state of society unworkable. On one hand, common standards of civilisation are disappearing, and international society is consequently breaking up into antagonistic groups. A universal family of nations no longer exists. On the other hand, social conditions have universally changed to such an extent that a large and significant number of rules are no longer applicable even among those states which have not broken away from the formed international community. These two developments, which the present writer has tentatively described as producing a "vertical" and a "horizontal" split in the structure of International Law,¹ cannot fail to lead to a very far reaching re-examination of the whole existing system of International Law. But one must not, of course, be afraid of the conclusions: that at present much of customary International Law has lost its validity. Moreover, these developments deeply affect the matter dealt with in Oppenheim's first part, and the difficulty of re-editing, at the present time, the second edition, dealing with special matters, without having first re-examined the basis on which they rest, is apparent throughout the book. Professor Lauterpacht faces the problems created by the five factors which he has just enumerated, with the following observation (p. 172)—

"However, while these factors have had the effect of blurring the established distinction in many respects and of necessitating a modification of some of the existing rules, they have left intact the fundamental rule that non-combatants must not be made the object of direct attack by the armed forces of the enemy."

Prominent examples of this way of adapting the old rules to new conditions, on paper, are the 1922 Hague Draft of Air Warfare Rules and the attempts made by various writers to make aircraft subject to the rules of sea warfare.² The former has largely failed owing to developments not yet so clearly apparent in 1922, but patent enough now, making the distinction between military and non-military objectives practically unworkable. The latter attempt was unreal from the very beginning. It was plain before 1940 that aircraft would not, except in very rare cases, escort captured merchantmen to a port or a warship, but would sink them.

¹ *International Law and the Present War*, Grotius Society, November, 1940.

² E.g. Smith, *Brit. Year Book of Int. Law*, 1936, p. 39 *et seq.* Développement moderne des lois de guerre maritime, —Hague Recueil, 1939, Spaight, *Air Power and War Rights*, 2nd ed., 1932.

Meanwhile, the rules of sea warfare themselves have become largely inoperative, in connection with developments clearly inherent in the five factors enumerated by Professor Lauterpacht but not pursued in their implications. These implications are far-reaching.³ On conclusions one might differ, but a radical re-examination of the whole law of war and neutrality is certainly indispensable, and it is disappointing to see the question neatly sidestepped in the present edition.

The most disappointing part of the book is the treatment of the law of neutrality. The deep impact of modern social and political international developments upon Neutrality Law Dr. Lauterpacht seems to have considered as no more than "prospects of changes in the future." In the general chapters on Neutrality there is not a hint of the twilight of neutrality as apparent in American Neutrality Legislation, or the development of so-called non-belligerency, which represents the other side of the development that makes neutrality of small nations the certain preparation for slavery. Is it beneath the dignity of the lawyer to take note of such developments? Can he dismiss them as being no more than breaches of the law, or developments too indistinct to indicate anything relevant for the lawyer? Far from it, all these developments are of the very greatest and immediate importance for the international lawyer unless he insists on teaching history instead of law. Some writers⁴ have pointed out the factors which fundamentally transform the conditions and the law of neutrality. These and other attempts to re-assess international legal developments in the light of modern social developments are not discussed. From a conservative point of view Professor Smith has re-examined the rules of sea warfare and their applicability to the use of aircraft in sea warfare, in his most interesting Hague Lectures of 1939. Among many other important problems he examines the extension of contraband to exports. Needless to say, enemy exports are stopped by belligerents as much as imports, owing to obvious developments of economic warfare. Professor Smith's suggestion that enemy goods carried on neutral vessels might be lawfully seized if "truly private," that is not state controlled,⁵ appears impracticable because no modern belligerent could conceivably leave a single article of import or export uncontrolled. But the whole question, as vital a legal problem as any, is not even mentioned in the new edition, and Professor Smith's re-examination of the whole matter does not get more than one or two footnote references.

In a very interesting new chapter Professor Lauterpacht assesses the importance of one of the most significant factors to change the face of International Law—the effect of state control over private activities on the law of neutrality. This problem has so far received surprisingly scant consideration by international lawyers.⁶ Its importance was illustrated by the note of the Soviet Government of October, 1939, which claimed immunity of its merchantmen from search and seizure because of complete state ownership. The universal, but internationally uneven growth of state control illustrates both the disintegration of international society and of a law which assumes homogeneity of social structure,

³ Cf. Morgenthau, *University of Kansas City Law Review*, 1939, . . . also *Amer. Journal of Int. Law*, vol. 34, p. 260, and the present writer in *Mod. L. R.*, vol. 3, p. 177; *Publ. of Grotius Soc.*, 1940.

⁴ Cf., e.g. Bottie, in *Rev. de dr. int.*, 1937, p. 123. Keeton and Schwarzenberger, *Making Int. Law Work*, 1939, and writers quoted in previous note.

⁵ *Recueil des Cours*, 1939, p. 30.

⁶ *Brit. Year Book of Int. Law*, 1938, p. 118 *et seq.*

and the obsolescence of the customary rules of neutrality, owing to a change of social conditions. At present a universal rule just does not exist. The old rules of neutrality would penalise socialist or semi-socialist government, but an alternative rule putting state controlled trade on the same footing as private trade would protect politically directed trade of neutral governments under the legal cloak of neutrality.⁷ Again, Professor Lauterpacht refuses to draw logical conclusions where they would threaten the paper stability of the existing system of International Law. To assert, as he does, that direct state management or control of economic activities has not yet become a prominent feature of the practice of states, is surprising for one writing in 1940. On this assumption, the conclusion is based that all states must abide by the existing rules. But a change is envisaged as possible, and the solution which Professor Lauterpacht recommends for what to him is still a future contingency is the setting up of special organisations of a private law character for the purpose of trading with the belligerent, with a corresponding relinquishment of state immunities. Professor Lauterpacht draws a most unfortunate distinction between actual government responsibility for production and trade and other government control of international trade. The latter is to have the same status as private trade, unless there is a mere appearance of private activity. As a model the Italian Neutrality Regulations of 1938 are quoted, which forbid state organs to supply munitions or credits to belligerents but allow it to private persons. (This legal document might usefully be judged in the light of Italy's part in the Non-Intervention Pact in the Spanish Civil War.) This sort of "Begriffs-jurisprudenz" invites the low esteem in which International Law is held by non-lawyers. Political control over international trade can effectively be exercised by political pressure, currency regulations, and a licensing system. Germany has maintained a completely watertight—and, needless to say, a politically directed—control, predominantly by these means. It is again the desire to maintain a continuity, which, in social and political reality, has long disappeared, that has prevented Professor Lauterpacht from developing a problem with that clarity which one expects from the author of "The Function of Law in the International Community."

In the present reviewer's respectful submission, it is impossible at the present time to write any textbook on International Law, for a textbook presupposes a tolerably well determined or, at least, determinable law. While a revolution is on, law is in the making, not in being. This is the chief issue. Professor Lauterpacht clearly believes that the present crisis of International Law is nothing but the result of an assault by lawless criminals which will soon be repelled and forgotten. Then, he apparently believes, International Law will more or less emerge again as it was, and gradually move forward.

The present reviewer believes, on the other hand—and distinguished writers on international relations have expressed similar convictions—that the present crisis is evidence of a far-reaching international social revolution, which will leave its mark on international society. The law analysed in the present textbook appears, to him, as one particular phase in a perpetual social evolution, no more or less permanent than earlier or later ones. Periods of great change are followed by periods of relative

⁷ Professor Lauterpacht's account of my opinion (p. 518) gives only one side of the argument. Consequently his refutation misses the principal point.

stability, and it is during the latter that legal comment and analysis become important. At present, it is submitted, the international lawyer can only try to assess the more important features of the international crisis in their effect upon the law, and thus help to clear the way for the international law of the future. Much can be done in this direction even now. But this task requires a sociological approach to International Law which is absent from the new edition of Oppenheim.

W. FRIEDMANN

NOTES OF CASES

Remuneration of Agents

The House of Lords in *Luxor (Eastbourne), Ltd., v. Cooper* (1941), 57 T.L.R. 213, decided that the principal of a commission agent who has agreed to pay him on completion of the transaction is not liable for damages for breach of an implied term: not without reasonable cause to prevent the agent from earning his commission, if he refuses to sell to a purchaser able and willing to pay the price stipulated. In refusing to read such a term into the contract the House of Lords has overruled *Trollope v. Martyn* (1934), 2 K.B. 436, where this implication was held necessary by the majority of the Court of Appeal (Greer and Maugham, L.J.J., Scrutton, L.J., dissenting). A decision in favour of the principal might have been reached without denying such implied term, either by finding as a matter of fact that the principal had reasonable grounds for his refusal to complete, as was done by the trial judge; or by holding generally and as a matter of law that a principal cannot be considered to act unreasonably towards his agent if he breaks off negotiations with an intending purchaser before the conclusion of a binding contract. But the House of Lords, in particular Lord Simon and Lord Wright, were not content merely to vary the meaning of "reasonable cause" as part of the alleged implied term. The difficulty of finding a satisfactory test to determine the existence of a reasonable cause led to doubts of the existence of the implied term itself. Considering the high rate of commission usual in such contracts of agency by which the agent will obtain in one completed transaction fair compensation for unsuccessful attempts; considering the general readiness of principals to deal with any satisfactory purchaser and the absence of all obligation on the part of the agent to procure a purchaser, it appeared not only unnecessary but even unreasonable to imply such a term. Moreover, if the implied term: not to prevent the agent from earning his commission, had been left intact, but the reasonable causes permitting breach of the implied obligation had been extended to allow for arbitrary refusal to complete, it might be thought that the exception had eaten away the rule. Even then, however, there would still remain certain implied obligations on the part of the principal which Lord Simon collectively described as duties to co-operate. Thus, he affirmed the existence of an implied obligation of the principal to permit inspection of the property by the intending purchaser. This and similar instances of the duty to co-operate can no longer be considered as applications of the general duty: not to prevent the agent from earning his commission, as the existence of such a general implied duty has been denied. They will now have to be specifically enumerated and read one by one into contracts of agency. Doubts and litigation arising from this question are conceivable. But it seems a price worth paying for the settlement of the far more important rules dealing with the remuneration of agents which, as the Master of the Rolls pointed out in *Trollope v. Caplan* (1936), 2 K.B. 382, at p. 401, were in an unsatisfactory condition. Estate agents, the class of agents chiefly affected by the present decision, will share in the benefits of greater simplicity and certainty of the law, and, as it will remain open to them to restore by express provision the implied rights which they have lost, their interests need not suffer as a consequence of this case. Their claim to commission after a binding contract

has been concluded between principal and purchaser was confirmed by the House of Lords although it was made clear that this point did not arise in the case. In the discussion of this situation it is possible to trace the effect of the decision in *Trollope v. Martyn*. The judgment of the majority of the Court of Appeal in that case had tended to blur the line by which the binding effect of a contract is confined to the contracting parties since the existence of contractual obligations between principal and third party was used as the test to determine whether the contract between principal and agent had been broken. The dissenting judgment of Lord Justice Scrutton was inspired by protest against this confusion of traditional concepts. The following passage from the judgment of Lord Wright (on p. 222) shows similar reliance on the interdependence of the two contracts: "It is necessary to reserve certain eventualities in which an agent may be entitled to damages where there is a failure to complete even under a contract like the contract in this case. For instance, if the negotiations between the vendor and the purchaser have been duly concluded and a binding executory agreement has been achieved, different considerations may arise. The vendor is then no longer free to dispose of his property. Though the sale is not completed the property in equity has passed from him to the purchaser. If he refuses to complete he would be guilty of a breach of agreement *vis-à-vis* the purchaser. I think, as at present advised, that it ought then to be held that he is also in breach of his contract with the commission agent—that is, of some term which can properly be implied." This must be contrasted with a passage from the judgment of Lord Russell of Killowen who arrived at the same result by interpreting the express terms of the contract of agency without referring to an implied term or to the contract of sale more than stating that it amounts to the fulfilment of a condition precedent of the right to commission. On p. 218 he said: "The position will no doubt be different if the matter has proceeded to the stage of a binding contract having been made between the principal and the agent's client. In that case it can be said with truth that a 'purchaser' has been introduced by the agent; in other words, the event has happened on the occurrence of which a right to the promised commission has become vested in the agent."

It can now be safely asserted that *Trollope v. Martyn* has been overruled, although attempts were made in the House of Lords, especially by Lord Romer, to distinguish that case on its facts. In his opinion, the agent in *Trollope v. Martyn* was "employed" to find a purchaser, whereas in the present case he was under no obligation to exert himself as "there was no contract of agency" (p. 226). It would seem, however, that Lord Romer attached too much significance to the word "employed" since whether the agent be "employed" or "engaged" or "appointed" can make little difference to his obligation, or, as is usual in the case of estate agents, to his freedom from all obligation to exert himself actively to find a purchaser. In the present case Lord Wright, for instance, refers repeatedly to the "employment" of commission agents.

All the members of the House of Lords emphasise, however, the distinction between a contract under which the agent binds himself to do certain work, in which case he will be entitled to remuneration for his services even if the principal refuses to avail himself of them, and a contract under which the agent is under no obligation to exert himself and is not entitled to any remuneration unless the property is sold to the purchaser introduced by him. In the opinion of the majority, especially

of Lord Simon, *Trollope v. Martyn* falls under the latter category of contracts, no less than the present case.

In drawing this distinction on which the right to remuneration is made to depend the House of Lords has set a difficult problem of legal construction. Contracts of the first type are contracts for work and labour where the consideration for the promise of the principal is provided by the services performed by the agent or his promise of such services. It is more difficult to find the consideration for the principal's promise in the second type of contract. The rendering of services which the agent is not bound to perform cannot be compared to Mrs. Carlill's use of the smoke-balls or to the furnishing of information for which a reward has been promised, for the use of the smoke-balls entitled Mrs. Carlill to claim the sum offered, but the rendering of services did not entitle the agent in the present case to any remuneration. It might be possible to meet this difficulty by saying that the services of the agent are the consideration supporting a promise subject to a condition, namely, the conclusion of a contract between principal and purchaser, whereas in *Carlill's* case the consideration supported an unconditional promise. The conception of consideration is not confined to operate only in support of unconditional promises. As the condition in this case requires the exercise of an arbitrary discretion by the promisor it might be argued that in this case, as distinct from the usual promise of reward-cases, the contract is not concluded by the agent's acceptance of the offer made by the principal, but that it is the agent who makes the offer by rendering services and that this offer is accepted by the principal when he enters into a contract with the purchaser introduced by the agent. But even if it is possible to accommodate in this manner this type of contract within the technical structure of the law of contract it might still be asked whether this type of contract is required by the mercantile community. From the point of view of the commission agent the alternatives open to him under the distinction drawn by the House of Lords are: the assumption of a binding obligation to exert himself on behalf of the principal in return for an unconditional claim for remuneration, or the retention of his freedom from any such obligation against a claim for remuneration which will depend upon the arbitrary acceptance of his services, if rendered, by the principal. Formally, these alternatives are balanced perfectly. But there can be little doubt that in most cases commission agents will prefer the first alternative, gladly relinquishing their freedom not to become bound to render services, which is substantially nothing but the freedom to abstain from exercising their trade and earning their living. Commission agents will only enjoy a free choice of these alternatives if by virtue of considerable bargaining power they will be able to force upon principals acceptance of the obligation to exert themselves on behalf of the principals.

Lord Romer's denial of a contract of agency in the present case referred to the absence of this obligation. It seems, moreover, that there is little justification for the use of the term agency in any sense in connection with the present case. This term denotes the relationship between two persons by which the one is authorised to bind by his acts another person as against third parties. This authority may be derived from status, as in the case of husband and wife or parent and child, or from contract, as between partners, master and servant, etc. In a narrow sense the word agency means the contract under which authority is conferred. As the agent in the present case had no authority to contract on behalf of the

principal or to bind him in any other way the word agency was inapplicable to the case unless it was meant to be used in a third, non-technical sense. It is regrettable that the House of Lords has not taken this opportunity to elucidate the meaning of agency and thus to remove one of the sources of confusion in this branch of the law.

J. UNGER.

Adulterous Unions and the Exercise of the Discretion of the Divorce Court

The exercise of the discretion of the Divorce Court for the petitioner's adultery provides one of the most striking instances of reform by judicial legislation under the pressure of changing social sentiment. The process which has changed the attitude of the Courts from one of recommendation to the spouses to live together and "find sources of mutual forgiveness in the humiliation of mutual guilt" (per Lord Stowell in *Beeby v. Beeby* (1799), 1 Hagg. Ecc. 789 at p. 790) to one under which "the refusal of the Court to exercise its discretion has become extremely rare" (Halsbury, Vol. 10 p. 689 note (k)) has been carried further by the decision of Sir Boyd Merriman, P., in *Andrews v. Andrews* (1940), p. 184. In this case a petition for divorce on the ground of desertion was presented with a prayer for the exercise of the Court's discretion in respect of the petitioner's adultery. Before a decree *nisi* had been granted the petitioner resumed his adulterous association—which, on the advice of his solicitors, he had broken off before presenting the petition—without disclosing this to the Court. The President held that there was no universal rule requiring the breaking off or interruption of adulterous associations until the decree had been made absolute. Where by virtue of a long association and the birth of children a new home had been set up there would be something unreal in such a demand, especially where the parties were too poor to provide alternative accommodation. In order to protect the interests of the children and in order to enable the adulterous union to be converted into an honest home, he refused to rescind the decree *nisi* despite the petitioner's attempt to deceive the Court.

Since the last war it had become settled policy to consider the interests of the legitimate and illegitimate children (Cf. *Wilkinson v. Wilkinson and Seymour* (1921) 126 L.T. 29 n.) and of the mother of the illegitimate children, but the present case probably exceeds previous authorities for there were no allegations that the respondent was responsible for the petitioner's misconduct, as in *Wilson v. Wilson* (1920) P. 20, or that the adulterous union had become permanently established, as in *Tickner v. Tickner* (1924) 40 T.L.R. 367. It must be noted for the explicit protection granted to the adulterous union which has led, or indeed may lead, to the establishment of a home. It is also of interest to compare the recognition of the home of the poor and the replacement of the family by the home as a unit of the law for the purposes of social legislation.

The tendency of modern family law, which is illustrated by the present case, cannot be described as destructive of the sanctity of the family, and it would be unfortunate if this case were to be explained in terms of a conflict between matrimony and adulterous association. It seems more correct to speak of a change of emphasis by which it has been recognised as more desirable to facilitate the grant of legal sanction to a social relationship which seems capable of fulfilling the functions of the family,

rather than to insist on the preservation of a union which has lost all foundation in reality.

J. UNGER.

Once More—Overlapping of Torts and Rationalisation of the Law

Singleness of mind, even if it means dreary repetition, appears to be the secret of success. What dictators do so effectively in a big way, the present writer will perhaps be excused for attempting in a very modest way, and in a very limited field. His theme is the increasingly confusing and rather senseless overlapping of torts, repeatedly treated in this Review.¹ A fresh and rather illuminating new illustration of the points made in previous observations is provided by *Hanson v. Wearmouth Coal Co.* (55 T.L.R. 747). In that case damage was done to a house by the explosion of gas, which had escaped from a broken gas main. The cause of the breach was a subsidence caused by mining operations of the second defendants, who had a right to let down the surface under their lease. Previous subsidences had occurred. The plaintiff sued (a) the Gas Co., which operated the main, (b) the Coal Co., which had caused the subsidence. Against the first defendant he was successful, against the second not. The Court of Appeal considered the case against the Coal Co. as one of negligence and found that, although the Common Law must expand to keep abreast of modern life and requirements" (Goddard, L.J.), there was no such proximity between the plaintiff and the second defendants as could have constituted a duty of care, in the sense constituted by *Donoghue v. Stevenson*. In principle, so it appears, the Court would have considered the Coal Co. as in a position analogous to that of a manufacturer in relation to the consumer. This is a sign that the principle of *Donoghue v. Stevenson* is gradually being extended to cover the whole field of negligence. But, according to the same principle, the intervention of a third party which ought reasonably to have inspected the article—this interpretation of the "opportunity of inspection" is now supported by the bulk of authority, *Grant's case* (1936) A.C. 55, *Paine v. Colne Valley Electric Supply Co.* (1939) 160 L.T. 24, *Herschthal v. Stewart & Ardern, Ltd.*, (56 T.L.R. 48) and the dictum in the present case—against *Dransfield v. British Insulated Cables* (54 T.L.R. 11) and one of two grounds in *Otto v. Bolton* (1936) 2 K.B. 46, negatives "proximity" and the duty of care, as between producer and consumer, or, as we should now formulate it more widely, as between the party in control of the property, be it factory, house or business, and the injured member of the public.

So far the judgment only gives new evidence of the gradually widening scope of the tort of negligence, which becomes more and more fitted to form the basis for the future general principle of tortious liability.

But it is the judgment against the first defendants which is of particular interest; for it demonstrates clearly the fusion of so-called strict liability with the modern conception of negligence. The Gas Co. was held liable, because it was its duty to safeguard the mains against interference from third parties. Carelessness was proved, since previous subsidence had occurred. The facts, and the decision in this respect, were almost identical with those in *North Western Utilities Co. v. London Guarantee Co.* (1936),

¹ Vol. I, p. 39 *et seq.*; Vol. III, 305 *et seq.*; Vol. IV, p. 139.

A.C. 109, which was, however, not even referred to. The latter case showed that the "strict" rule in *Rylands v. Fletcher* is now less strict than negligence.² In the present case Goddard, L.J., appears to fuse the two torts altogether.

"A person who brings a dangerous thing on to his land and allows it to escape, thereby causing damage to another, is liable unless he can show that the escape is due to the conscious act of a third party and without negligence on his own part."³

This statement of Goddard, L.J., grafts negligence on to the rule in *Rylands v. Fletcher*, and those who, like Dr. Stallybras,³ or the present author⁴ hold that the distinction between the two torts has no longer any meaning, will find little fault with it. The surprising thing is that such a judicial statement should have passed apparently unnoticed.

The fusion of these two torts is but part of the wider movement which would bring under a modern conception of negligence the whole group of torts which centre round a duty rather than the protection of a specific interest. It would comprise at least negligence, the rule in *Rylands v. Fletcher*, liability for fire, animals, dangerous premises and chattels, nuisance and statutory duties. What an economy of effort in practice and theory that would mean!

W. FRIEDMANN.

Taxation of Principal and Subsidiary Companies

It has for a long time been typical of the "rationalisation" of industry that there should grow up an inextricably interwoven network of subsidiary companies under the control of a principal company which usually co-ordinates their activities besides, in many cases, carrying on a business of its own; for all legal purposes, and for those relating to the Income Tax Acts, these companies are separate entities with the result that—for taxation purposes—losses made by any of the subsidiary companies cannot be set against the profits of other such companies or those of the principal company. Moreover it has long been held that, where advances are made by a parent company to a subsidiary in order to enable the latter to carry on its business, no allowance can be made for taxation purposes when these advances prove worthless because of unsuccessful trading or similar reasons; the grounds for such disallowance are that the amounts written off represent losses of capital and are neither bad debts nor proper trading expenses, *cf. inter alia*, *English Crown Spelter Co., Ltd., v. Baker* (1908) 99 L.T. 353 and *Chas. Marsden & Sons, Ltd., v. Inland Revenue* (1919) 12 Tax. Cas. 217.

In *Odham's Press, Ltd., v. Cook* (1940) 55 T.L.R. 704 (H.L.), the taxpayer returned to the charge in respect of a somewhat analogous writing-off in the principal company's accounts; the appellants owned the entire share capital of eight other companies and generally controlled their activities, though each was, of course, a separate entity in law. *Odham's Press, Ltd.*, executed work at ordinary trade prices as printers for one of the subsidiary companies which made a loss in 1933; in their accounts for that year the appellants wrote off the exact amount of their loss and claimed that such writing-off represented "money wholly and exclusively incurred

² *Cf.* 1 Mod. L. R., 57.

³ In *Salmond Torts*, 9th ed., sec. 149.

⁴ In 1 Mod. L. R., p. 39 *et seq.*

for the purposes of the trade" and that it was therefore a proper deduction in computing its profits, Rule 3 (a), Cases 1 and 2 Rules, Schedule D, Income Tax Act, 1918. The fact-finding tribunal, the Special Commissioners of Income Tax, found that such writing-off was not "wholly, etc., incurred" for the purposes of the appellant company's trade and refused the deduction; their decision was upheld by the House of Lords on the ground that there was ample evidence to justify the Commissioners' finding of fact. It was emphasised that each company was a separate taxable person and that, though the trade of one company might affect that of the other, this did not make the two businesses one in law; the appellants were interested in the subsidiary both as printers, i.e. trade customers and as shareholders and the fact that they did not wish their general reputation to suffer—for the business world considered *all* the businesses as the appellant's—did not entitle them to charge as an expense the amount necessary to expunge their subsidiary's loss in its accounts.

It is interesting in this regard to note that for the purposes of the recently imposed Excess Profits Tax it has been found necessary to enact special, and exceedingly involved, provisions whereby, in effect, one charge is made in respect of the combined profits of a principal company and all its subsidiaries; this is probably to prevent evasion of taxation by shifting profits and losses between the different companies so as to reduce the excess to a minimum which might be the result if each company were still considered a separate entity; these provisions will be found in the nineteen pages of the Fifth Schedule, Finance Act, 1940—provisions complicated and abstruse beyond that usual even for taxing acts. Section 29 of the same Act should also be noted as this provides for special treatment, for the purposes of the Excess Profits Tax, of a "co-ordinating body corporate," viz. a company which exists wholly or mainly for the purpose of co-ordinating the administration of a group of companies.

A. FARNSWORTH.

Fixed or Floating Capital

Vaughan v. Archie Parnell, Ltd. (1940), Tax. Cas. Leaflet No. 1095, is, in its small way, an interesting commentary upon the difference between the taxation treatment of increments to fixed or to floating capital; increments of the former are capital accretions not liable to income tax, whereas in the case of floating capital its variations attract liability to tax. In the instant case the respondents, whose business was that of theatrical agents and producers of plays, had been awarded £5000 damages for breach of one of the terms of his contract by the licensor of a play, whose production had been purchased by the company, not to sell the film rights of the play. The General Commissioners of Income Tax had held that the £5000 was a receipt of a capital nature, the argument being that the money had been awarded for depreciation of the licence which it was claimed was a fixed asset. Lawrence, J., felt no difficulty in accepting the contrary argument for the Revenue viz. that the licences granted to the company were part of its stock-in-trade, i.e. floating capital, since it was a necessary incident of the business that licences to produce plays should be acquired. Just as the cost of these licences was a proper revenue debit against profits, so was this £5000 a proper revenue receipt since it was awarded as damages for breach of contract, the measure thereof being the company's loss of profits by reason of the breach.

A. FARNSWORTH.

Meaning of "Trade"

Morning Post, Ltd., v. George (1940) Tax. Cas. Leaflet No. 1091, emphasises that, for the purposes of the Income Tax Acts, the terms "trade" and "business" are not necessarily synonymous. The appellants in this case had published for many years a daily newspaper at a loss; by agreement with the *Daily Telegraph*, their paper ceased to be published as a separate newspaper and its name was absorbed by the latter paper; the appellants thereafter had no premises or staff of its own and, by the terms of the agreement, were to be paid a sum of £1000 monthly, sharing neither in the profits nor the losses of the joint newspaper. Assessments upon these monthly sums, as "annual payments" chargeable under Case III of Schedule D, were objected to on the ground that the company was still carrying on a trade chargeable under Case I Schedule D and that it was therefore entitled to have set against these monthly sums the considerable antecedent losses it had made while it was publishing a newspaper. Sec. 237 Income Tax Act, 1918, defines a "trade" as "any trade, manufacture, adventure or concern in the nature of trade" and Lawrence, J., found no difficulty in holding that the mere receipt of these monthly sums was not a "trade" within the definition referred to. It should be noted that other taxing acts, e.g. those relating to Excess Profits Duty, National Defence Contribution and Corporation Profits Tax, have their charging sections in wider terms, i.e. "all trades and businesses of any description"; this latter expression has been held by the House of Lords to bring within the charge to tax the mere receipt of investment income by a company, as in *Inland Revenue v. South Behar Railway Co., Ltd.*, [1925] A.C. 476, where the company's only income was an annuity. The term "business" embraces all that the expression "trade" infers, but the latter term is considerably narrower and must be understood in its strict sense. Those interested further are referred to *The Residence and Domicil of Corporations*, App. V, where consideration is given to the question, both in English and American law, of "what amounts to carrying on business by a corporation."

A. FARNSWORTH.

Charitable Trusts

In three recent cases unsuccessful attempts have been made to stretch the legal meaning of the word "charitable."

The word occurs in all three in the residuary bequest of a will. The finding of the Court, therefore, that the respective gifts fail for uncertainty, in each case causes an intestacy. Discovering the next of kin entitled may or may not be an easy task, but so strong is the force of precedents concerning the interpretation of this fateful word, that it completely overshadows the rule of interpretation embodied in the phrase: the Courts lean against an intestacy.

The first of these three cases, *Re Horrocks, Taylor v. Kershaw* (1939), p. 198, adopted a new method of attack. Eight years after the death of the testatrix the solicitor who drew the will discovered that "or" instead of "and" had been written between "charitable" and "benevolent," thereby invalidating the residuary bequest which ran: ". . . shall apply the residue for such charitable institution or institutions or other charitable or benevolent object or objects in Preston and district as my trustee or trustees may . . . select. . . ." An action was then brought to prove

the will in solemn form with the word "or" omitted, and the Probate Court granted the probate in this form. But the Court of Appeal refused to sanction this. The Master of the Rolls in the course of his judgment said that there was insufficient evidence upon which the Court could act; and to write "or" instead of "and" in such a context was a natural error for a solicitor to fall into. From the legal point of view it was immaterial whether there was a mistake in the legal effect of the words selected; to omit "or" would be to make a new will as it would give a totally different effect to the will. It was in discussing this last point that the Master of the Rolls referred to the meanings of the words "charitable" and "benevolent," and said "If the case had been that the words 'or benevolent' ought to be struck out, the word 'charitable' would have remained with its full significance as was intended by the testatrix."

The last part of this sentence clearly shows that the Master of the Rolls appreciated what the testatrix intended, but nevertheless the technical interpretation apparently cannot be overruled.

In *Re Diplock, Wintle v. Diplock* (1941), 57 T.L.R. 263, the residuary bequest was almost identical; it contained the fatal phrases "such charitable institution or institutions or other charitable or benevolent object or objects." The judge of first instance held that a general charitable intention in the strict legal sense governed the whole will and that therefore the gift was saved. He attempted to make the strictly legal interpretation cover the obvious intention of the testator. But the Court of Appeal overruled this. The Master of the Rolls said that two questions were involved: one of construction and one of principle. There is one exception to the rule requiring certainty of beneficiary, in the case of a charity. But this exception does not go beyond the legal meaning of "charity." On the question of construction he said that "or" is a very definite disjunctive, and that at least in this particular will there was no room for any other interpretation of it. The word "benevolent" has not altered in meaning so as to mean "charitable" or to cover the same ground as "charitable," and in all the authorities and precedents "benevolent" has a meaning which goes beyond "charitable." Further he did not agree with the finding of the judge in the Court below, he (the Master of the Rolls) found no general charitable intention in the will, and asked how else but by the use of the word "benevolent" could wider than "charitable" intentions be expressed. The judge below had not construed the will as a whole but in bits.

Once again the obvious intention of a testator has been disregarded, but perhaps a little hope can be gathered from Lord Justice Goddard's remarks: "I do not regard the rule with respect but that is irrelevant. Perhaps the Legislature will think fit to intervene and by means of a private Act restore to deserving charities benefits which Mr. Diplock intended them to receive." But there is still another chance. Leave to appeal to the House of Lords was granted, and the House of Lords may take the opportunity to effect a much needed expansion of legal interpretation.

The third case, *Re Ward, Public Trustee v. Ward and Others*,¹ involved different words and here the gift failed because of the interpretation of the words "or religious." The gift was worded in favour of "the Archbishop of Westminster or other the head of the Roman Catholic Church

¹ (1940), 57 T.L.R. 326.

in England for the time being on trust that he shall forthwith in his absolute discretion devote the same to the furtherance of educational or charitable or religious purposes for Roman Catholics in the British Empire in such manner in all respects as he may think fit." The perhaps less manifest intention of this bequest too has been sacrificed to the narrow rules of interpretation. It was held that there was no general charitable intention in the will as a whole. There was no doubt that the words "educational" and "charitable" definitely meant "charitable" in the legal sense, but the word "religious" in the context of the will could include purposes which were not within this meaning. A similar case, *Re Ashton, Westminster Bank v. Farley* (1939), 3 All E.R., p. 491, was referred to, where the House of Lords held that "for parish work" could include purposes not strictly charitable. It had been argued that the word "charitable" in this, the *Ward* will, should be construed in a non-legal sense, so that the gift would read "for the purpose of education, or for the relief of poverty, or for the advancement of religion," each and all of which is strictly "charitable," and thus save the gift. But the Master of the Rolls could not agree with this; there was nothing in the wording of the gift to prevent the Archbishop from applying the property to some particular activity of the Roman Catholic Church not legally "charitable"; in his opinion there was a deliberate intention to go outside the legal definition of "charity" and therefore the gift must fail.

It is quite time something was done to rectify this state of affairs whereby many deserving charities—in the layman's sense—are being deprived of property manifestly intended for them by testators.

J. H. EZARD.

REVIEWS

HISTORICAL INTRODUCTION TO THE THEORY OF LAW. By J. WALTER JONES. Oxford Clarendon Press, 1940. 15s. net.

Mr. Jones has boldly and successfully ventured into a field hitherto badly neglected in English, although much less in American Jurisprudence. Fortunately, the days are over when Jurisprudence meant, to the English student of law, some knowledge of Austin and Salmond, plus, perhaps, a little Gray and Pollock, and anything beyond that was either "meta-physical," "continental," "philosophical," or something similar and certainly objectionable. Slowly, very slowly, the conviction is gaining ground that legal theory is not only a vital part of legal education, but that it confronts the practical lawyer, judge, administrator, adviser, no less than the legislator, in the course of their work.

Mr. Jones's book is, therefore, doubly welcome: as a systematic contribution to a part of jurisprudence which badly needs exploring, and as a very scholarly and attractively written study of a number of important legal theories. The field of legal theory is, of course, so immense that a book of 300 pages can only pick out some aspects. Mr. Jones calls his book an "historical" Introduction. It is not quite clear why; perhaps because the first, particularly learned, chapter is devoted to Roman and the Medieval Civilians. Apart from that, there is nothing particularly historical about either selection or treatment. From the vast field of legal theory, Mr. Jones has picked out some but by no means all of the more

important theories and problems. That no systematic treatment of such a matter as Natural Law could be otherwise than, to a large part, historical goes without saying. The following is a brief critical summary of the chapters following the first (on the Civilians)—

In "The Historical School and Codes," a very full discussion is given of Savigny's School and the Germanists, and much briefer observations on Maine and Maitland. Why Ihering should be treated in this chapter it is difficult to see. He should head a chapter on sociological Jurisprudence, but that does not appear in the book under review. Next comes a chapter on Sovereignty, which is excellent on the historical side, but very sketchy on modern theories of sovereignty. The opportunity of tracing the concept from its origin to its modern juristic and political implications, Mr. Jones has not taken. Again, one is surprised to find Bentham treated in this chapter. Next comes a brilliant if concise chapter on Natural Law, with an excellent discussion of Natural Law theory in American legal development. I should question the selection of Gény, Duguit and Stammler as the most important modern Natural Law theories. Duguit would turn in his grave if he saw himself thus treated. However, he certainly is something of a Natural Law philosopher of the scholastic type, *malgré lui*. But the origin and context of his theory makes this description somewhat incomplete. Stammler should at last disappear from the ranks of Natural Law philosophers. It is only possible to understand his formal idealism by reference to his Neo-Kantian antecedents. For Del Vecchio, on the other hand, who is not mentioned, Natural Law as a principle of evolution is an essential part of his legal philosophy. Again, the modern scholastics, like Cathrein, Le Fur, etc., should find a place here. Somewhat surprisingly, from the point of view of a systematic study of legal theory, there follows a chapter on Public and Private Law, which one would, on the whole, rather class as Analytical Jurisprudence, artificial though this division is in many respects. The following chapter too, dealing with the fiction theory, one would hardly expect in a book on legal theory. For the use of the fiction in law, which Mr. Jones discusses with great lucidity, is eminently a matter of juristic technique, even if Vaihinger has made the fiction the basis of a philosophy. Mr. Jones's selection of material makes it doubtful what exactly he understands by legal theory. The borderlines are certainly not always clear, but I should think that "theory of law" means thought about the law, its function and objects. There is a fairly clear distinction between this and the technical apparatus of law, its concepts, classifications, etc.

Next comes a chapter on "Psychological Theories," which deals with certain aspects of what is vaguely called "sociological" approach to law. Theories about social as well as about individual psychology in its relation to law are discussed in this chapter (Ehrlich, Jerome Frank). Just why this should have been singled out and other ways of sociological approach to law left out it is not easy to see.

The weakest chapter of the book is that on "The Metaphysicians." Indeed, a number of essential questions, such as the relation of Metaphysics and Positivism or Empiricism, are put. But a chapter which has half a page on Hegel, nothing on Kant and Fichte, and the Neo-Kantian movements, can hardly be said to give an account of the Metaphysicians.

An excellent chapter on the Pure Theory of Law is followed by a chapter on Law and Economic Theory which does not so much give a general discussion of the relations between Law and Economics, apart

from an account of Marxist theory, as discuss certain specific problems, in particular, theories of money. Interesting though inconclusive observations are made on the attitude of judges to economic definitions. Strangely enough, there is, in this chapter, no discussion at all of such matters as Restraint of Trade or Conspiracy, where the judicial attitude towards economics, and the unconscious adoption of specific economic and political theories is most patent (*Mogul* case, *Salt* case, etc.). But the chapter is full of interesting material.

The book ends with a chapter of quite outstanding merit and brilliance, entitled "Revolutionary Legality." It traces the essential legal characteristics of modern Dictatorship and, on the whole, sees Russian Communism, German National Socialism and Italian Fascism as variations of one theme. In this chapter in particular the author reveals an unusual familiarity with Continental and, in particular, German legal literature.

Throughout the book, an easy and elegant, often aphoristic style is coupled with a complete mastery of the subject. The present reviewer, at any rate, has been unable to discover any palpable inaccuracy.

The treatment of a subject of this kind is so much a matter of individuality that criticism must be careful not to substitute the reviewer's individuality for that of the author.

But the following observations appear necessary from the angle of one concerned with the teaching of Jurisprudence and Legal Theory—

1. The selection of the material does not seem to show a coherent thread. It is rather like a collection of essays on various problems of legal theory and jurisprudence.

2. The book is hardly suitable for any but very advanced students. For it presupposes a knowledge of the theories and authors discussed. On Gény, Duguit, Ihering, Bentham, for example, one will discover excellent observations in Mr. Jones's book. But it neither is possible nor, I suppose, intended to gather from them an idea of the substance of those men's teaching. Where such knowledge is possessed, this book will be of great value.

3. On the whole, the discussion is descriptive, not critical; but it is apparent from numerous little turns, critical observations, etc., that the author has his views, but is content with just hinting what he thinks. Mr. Jones is obviously well aware of the great political issues in which legal theory is embedded. But he does not state them more than very occasionally.

Legal theory stands half way between philosophy and political theory, between knowledge and ideals. This provides the connecting link between the principal movements in legal thought which, in this brilliant and stimulating book, stand somewhat disconnected.

W. FRIEDMANN.

CAMBRIDGE UNIVERSITY AND CRIMINAL SCIENCE.

Readers of *THE MODERN LAW REVIEW* will receive with the liveliest satisfaction the announcement recently made that the Faculty of Law of the University of Cambridge has set up a committee to consider the promotion of research and teaching in Criminal Science with terms of reference covering the following matters—

1. The prosecution of research;
2. The promotion of a series of publications;

3. The organisation of lectures in Cambridge by recognised authorities on various branches of Criminal Science;
4. The analysis of the development of research and teaching in Criminal Science in England and other countries;
5. The submission through the appropriate channels of memoranda on existing and proposed penal legislation;
6. The transmission to correspondents in other countries of information concerning the achievements and progress of penal reform and of the administration of justice in England;
7. The special application to developments in the British Commonwealth of Nations of such of the above mentioned activities as are appropriate.

The committee is under the chairmanship of Professor Winfield and that is a sufficient guarantee in itself, if such were necessary, that the committee will at the same time be "on the side of the angels" and have "its feet on the ground"—a combination of circumstances which has not always attended the study of criminal science. The secretary is Mr. J. W. C. Turner and that is a guarantee that the work of the committee will be pursued with indefatigable energy born of high purpose. By his teaching and his writings on the subject, Mr. Turner has already produced a new attitude and a new approach to the problems of the substantive criminal law in several generations of Cambridge students, not to mention the interest which his articles in the *Cambridge Law Journal* have aroused in widespread legal circles, particularly in Great Britain and the United States, in the analysis of the basic conceptions of crimes at common law. Dr. Radzinowicz brings to the committee the fruits of wide learning and experience gained in several countries, the value of which has already been made manifest in many contributions to the study of criminal science in England. The fourth member of the committee, Dr. R. M. Jackson, needs no introduction or commendation to those who have read his recent masterly exposition of "The Administration of Justice in England." With such a strong team in charge of its direction, this enterprise is born with the omens all favourable and the expression of good wishes, and of hope that realisations will even exceed expectations, is almost superfluous.

Close on the heels of the announcement of this enterprise, came the publication of the first volume of studies under the auspices of the committee.¹ In the preface, Dr. Winfield pays a notable tribute to the inspiration of the teaching of the late Professor Kenny and to his pioneer work in his famous text-book in directing the minds of students of the English Criminal Law to the problems of the sciences allied to it.

In their Editorial Note, Dr. Radzinowicz and Mr. Turner emphasise the need for the establishment of a scientific body of principle as a prerequisite to intelligent and systematic reform.

"The study of criminal science has been until recently very neglected in England. On the practical side, however, in the general treatment of crime and criminals this country has made noteworthy progress, especially during the last half-century. This illustrates the national

¹ *Penal Reform in England: Introductory Essays on Some Aspects of English Criminal Policy*. English Studies in Criminal Science, Vol. I. Edited by L. Radzinowicz, M.A. (Geneva), LL.D. (Cracow), LL.D. (Rome), and J. W. C. Turner, M.C., M.A., LL.B. (Cantab.). Preface by P. H. Winfield, F.B.A., LL.D. (Cantab.). London: King & Sons. 1940. 177 pp. 10s. 6d

characteristic of recognizing practical needs before theoretical principles are developed, or even appreciated. Like all other sciences, criminal science must advance by method and system. It is not so long ago since criminal science was identified with the study of the criminal law. The fundamental error of this conception has come to be increasingly appreciated. Criminal law is only one branch, and by no means the most important branch, of criminal science. Effect is given to criminal policy by criminal law, which is thus no more than the instrument of criminal policy. Criminal law is dependent and functional rather than creative. There is necessarily and properly a wide range of literature on criminal law, but very little on criminology and criminal policy has so far been written in this country."

With the substantial truth of this view few thinking persons will be found to disagree. The establishment of university provisions for the advancement of such studies during the past decade is a significant, if yet insufficient, indication of a growing awareness of our deficiencies in this respect. This has partly coincided with, and partly been encouraged by, the advent into our midst of a number of Continental scholars of eminence and repute in this branch of knowledge—a happy circumstance for which we have to thank our enemies.

But there is a question of policy and method which the friends of criminal science in this country ought perhaps to consider more deeply than some of them have done. Admitting the delinquency of England in its neglect of scientific and systematic study of criminal science, is reform best achieved by rather sweeping statements about the extent of that neglect? Are we not in danger of failing to apply to our delinquent nation those very principles of reform which we advocate as proper in the case of the individual delinquent, namely, that his self-respect must not be undermined by an over-emphasis on his delinquent past? Few sinners are brought to repentance and reform by an unduly depreciatory portrayal of their pasts. The delinquent whose sins are too oft proclaimed or exaggerated is apt to develop a defence mechanism of glorification in his historic delinquency. Can we not with truth appeal to a better past from which we have departed? If we can, then in the interests of truth and of reform we ought so to do. There is a large and powerful class in England, possessing very substantial influence on the course of reform through professional strength, a disproportionately heavy parliamentary representation, and the weight which its opinions on these matters still carries with a considerable section of the lay electorate, which is apt to glorify unduly in our national "uniqueness" and our allegedly highly-beneficial and "practical" preference for "experience" rather than "theory." There is a substantial basis of truth in this; and in the history of criminal science there are many instances of great foolishness masquerading as "scientific theory" which encourages this standpoint. The aim which we desire to achieve is surely an amalgamation of our "practicalness" with sound scientific study. That end is not to be achieved by the unduly depreciatory estimates, to which we are sometimes treated by well-meaning friends of criminal science, of the contributions of our national genius to this branch of social science.

The learned Editors of this work, in their preliminary compliment to English reforms, especially during the past half-century, do pay tribute to our national efforts on "the practical side." But could they not with

justice have qualified some of their other statements a little? Bearing in mind the general degrees of advance in scientific methods in the social sciences at given points of time, has England, relatively to the achievements of some other comparable nations, *always* lagged behind in its interest in, and its contributions to, developments in the field of criminal science? Or is our delinquency only especially aggravated in modern times—say, in this century, or after the last war? Could not the statement that “very little on criminology and criminal policy has so far been written in this country” not have been slightly qualified to pay the credit which is due to some of our ancestors? When the history of criminal science in England comes to be written, will the glory of the dawn be attributed to the fourth and fifth decades of the twentieth century? Perhaps it will, but we fail to believe that our historians will not mention some bright morning stars preceding the dawn.

Some years ago, attention was directed in *The Annual Survey of English Law* to a study by two learned American writers of the contributions of English scholars to criminal science which gave us some little encouragement to lift heads bowed under the shame engendered by repeated reiterations of our deficiencies.² Dr. Mannheim has recently drawn attention again to this study in a passage in which he remarks as follows—

“That is not to say that in the author’s view research into problems of this kind have been greatly neglected in this country. On the contrary, they have formed the object of continuous effort by English scholars for more than a century and a half. From John Howard and the brothers Fielding to Colquhoun, Bentham, Whately, from Mary Carpenter, Davenport Hill and Henry Mayhew to L. O. Pike, W. D. Morrison and Charles E. B. Russell, from the Report on Criminal Commitments and Convictions of 1827–28 to the Gladstone Report of 1895 and the Report on Capital Punishment of 1930, hardly a single decade passed without witnessing an English contribution of outstanding importance to contemporary criminological thought. Considering the lack of adequate scientific method possessed by those official investigators and private scholars, the average quality of their work must be regarded as of surprisingly high standard.”³

Dr. Mannheim’s list of contributions could be widely extended. Some recent writers on the subject have gone as far back as Bacon and Hobbes. From evidence accidentally collected here and there, we suspect that much more was written on criminal policy in this country by the pamphleteers of the eighteenth century than we know to-day. In our review of our history, is it not time we re-discovered William Eden, Lord Auckland? Bentham is in the list, and if that name were the only one in it, we could bear our heads high and have an abiding inspiration to greater national effort in the development of criminal policy and reform. Russia, India, Poland, Egypt, Portugal, Spain, France, the United States, the South American Republics, were they not all directly affected by his views of legal policy? Nor can we forget Romilly and Mackintosh—the latter very much overdue for a greater appreciation of his work for criminal reform. Could not Charles Dickens be fairly put in the list?

² “English Ecology and Criminology,” by Yale Lewin and Alfred Lindesmith; *Journal of Criminal Law and Criminology*, Vol. 27, No. 6.

³ *Social Aspects of Crime in England between the Wars*, p. 13.

And a host of lesser names, like Andrew Amos (who was indefatigable in his acquirement of information from other countries), Tallack, Maudsley and others. Nor were Fitzjames Stephen and his friends and collaborators narrowly interested in problems of the criminal law alone without reference to wider principles of criminal policy. Some names worthy of commemoration could also be brought from north of Berwick-on-Tweed.

In the official reports of the last century may be found a dusty but monumental reminder not only of the deep interest of a considerable number of learned and sensitive minds in matters of criminal policy but also of their continual awareness of the development of thought and practice elsewhere. Beccaria's "Essay" was in its third edition in English by 1770.

England, fortunately for itself, has never been completely bereft of a goodly number of influential people, backed by a solid core of supporters who were not completely deaf to the call of "conscience" (precede it with what epithet you will, "Nonconformist," "social," or other!) or blind to the value of "principle," study and system. At times, they have been much swamped by more vulgar influences; but the salt has never completely lost its savour. Our deficiencies in the study of criminal science and failures in achievement of reform are not entirely attributable to complete neglect of them. We have sometimes bought our "democracy" at the price of failure to harvest the fruits of our best minds, extraordinary and ordinary. It may come as a surprise to some to know that a very warm tribute was paid a few years ago by an author very knowledgeable in the history of crime in England in the last century to the continuous sensitiveness of *The Times* newspaper in matters of criminal justice! The traditions of another great English paper are too well-known to need mentioning.

We, therefore, welcome this new development in the University of Cambridge not as something completely novel, nor as the promise of a corrective to a natural and persistent national malaise, but as a modern expression of the continued vitality of a fine English tradition which has tended to grow pale and to wither at times but has never been killed. Under the care and skill of the nurserymen of East Anglia, the old seed should bring forth vigorous new plants to bear blossom and fruit in great abundance!

In a review in *The Manchester Guardian* under the initials of a distinguished contributor to the literature of the social sciences, a slight apprehension was expressed lest the very salutary insistence of the Editors of this volume on the subsidiary and adjectival nature of the Criminal Law in relation to other branches of Criminal Science should represent a swing of the pendulum to the other extreme from that which they deplore. The learned reviewer can hardly be well acquainted with Mr. Turner!

To proceed from the Editorial Note to the main contents of this volume, it should be emphasised that the object of it is to give an outline description of "here" before subsequent volumes proceed to study and to answer the question, "Where do we go from here?" Within the compass of 165 pages, there are nine essays and one appendix devoted to this object.

Mr. S. K. Ruck writes on "Developments in Crime and Punishment"; his study is a very broad outline based on the study of criminal statistics. There are some strange statements here and there, such as those which indicate that ten persons who committed murders were sentenced to long terms of imprisonment and that a study of criminal statistics shows "a

marked decrease in the number of *civil offences*." Miss Cicely Craven contributes an excellent essay on "The Trend of Criminal Legislation." It may be suggested that the reference to the fact that the Summary Jurisdiction (Appeals) Act was introduced by a private member might have been amplified to do justice to Lord Sankey, who was understood to have given powerful impetus to reforms about this date. The Infanticide Acts of 1922 and 1938 (and the 1938 Act should be noted) were largely due to the work of private members amongst whom Mr. Arthur Henderson and Lord Dawson deserve special mention. Mr. Lieck's summary of the topic of "The Administration of Criminal Justice" is a most remarkably efficient work of condensation of a vast quantity of material. The only point of addition which can be suggested is a note on the provisions of The Administration of Justice Act, 1938, s. 11 on p. 57. No one would deny that the Court of Criminal Appeal has not been a great success but in a work devoted to the advancement of the study of principle and system the rather disappointing contribution of the Court to the development of law could be discussed shortly. With many of the views and complaints advanced in the essay on "The Right of Fair Trial," by "Solicitor," there is a very substantial body of agreement, but, with every respect, it is rather doubtful whether this is the type of study which should find a place in *this* kind of volume published under *this* kind of auspices. To find the old use made of the provisions of Magna Carta revived in *this* volume is almost incredible. (*Woolmington's Case* appears under the name of *Woolavington* on p. 77.) Towards the end of this essay there is some overlap with that of Mr. Lieck. As could be expected, Mr. A. C. L. Morrison's study of "The Jurisdiction of Juvenile Courts" is a sound summary of the subject. His remark that these courts rarely impose fines is perfectly true as a general statement, but in a later essay in this volume, as well as in Mr. Bagot's recent study of Juvenile Delinquency in Liverpool it is stressed that there are some courts which are very backward in this respect. Miss Elkin ends her essay on "The Treatment of the Juvenile Delinquent" with such a gracious caveat that it is almost superfluous to stress that there are two points of view on some of the matters of which she treats. Mrs. Rackham's contribution is on "The Probation System." In a small volume of this size the amount of overlap in these essays might well have been lessened. Miss Margery Fry's study of "The Borstal System" is about the most delightful in the volume. Mr. J. A. F. Watson gives a summary account of "The Prison System" which is based on his recent work, *Meet the Prisoner*. The appendix sets forth some recent authoritative recommendations relating to prison reform.

Though the work contains very little that is novel, and suffers from the packing of many essays into narrow confines, it is a useful popular introduction to its subject matter. Its main merit, however, is that it is the harbinger of weightier things to come.

D. R. S. DAVIES.

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